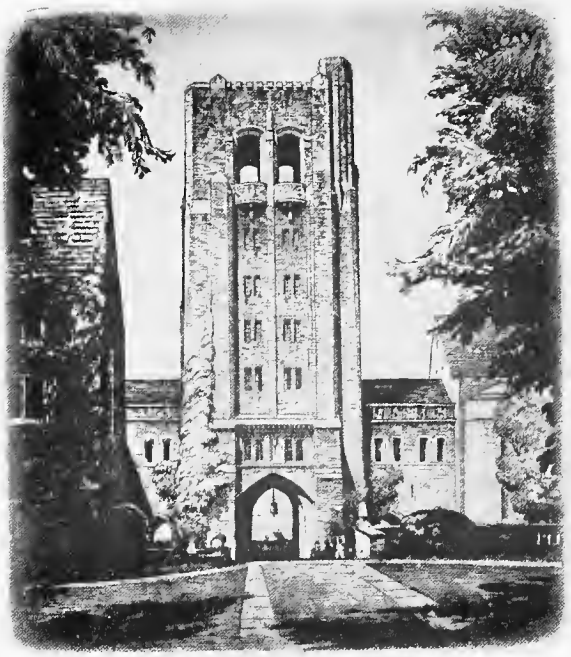

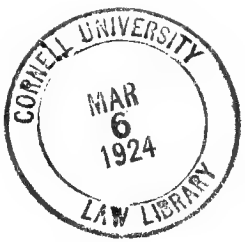

A TREATISE ON

PLEADING AND PRACTICE

IN THE COURTS OF RECORD OF

NEW YORK

INCLUDING PLEADING AND PRACTICE IN ACTIONS GENERALLY
AND IN SPECIAL ACTIONS AND PROCEEDINGS
AND APPELLATE PROCEDURE

WITH FORMS

BY

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PREFACE.

Owing to the multitude of decisions construing the provisions of the Code and setting forth rules of practice, the frequent changes in the Code, and the number of courts, the practice in the courts of record in the state of New York is oftentimes difficult to determine. No apology is therefore deemed necessary in presenting to the New York lawyer the local law pertaining to practice and pleading as it exists at present.

Great aid and encouragement has been received from the justices of the supreme court. Some twenty received and examined proofs, and the author feels that he must make grateful acknowledgment of the very special interest taken by Justices W. S. Andrews, Alden Chester, Samuel Greenbaum, Warren B. Hooker, John M. Kellogg, Edwin A. Nash, Edgar A. Spencer, Charles H. Truax, Truman C. White and Maurice L. Wright. The suggestions and criticisms received have not only been of immeasurable benefit to the author, but if the profession shall find the work of merit, much of the praise will be due to those members of the bench, who, for no reward save the desire to be helpful to the bar, have not hesitated to give liberally of their valuable time.

The citations of decisions in this work are intended to be full and complete except where there are a multitude of cases holding the same propositions of law, in which case the earliest decisions and the more recent decisions of the court of appeals have generally been given, together with a reference to the local digest where the remainder of the cases may be found. In some cases where the proposition of law only remotely bearing on questions of pleading or practice has been stated, a mere reference to the digest has been deemed sufficient.

BOOK I.

GENERAL PRACTICE.

PART I.

MATTERS TO BE CONSIDERED BEFORE INSTITUTION OF PROCEEDINGS.

PART II.

PRACTICE RELATING TO ACTIONS GENERALLY, BUT NOT SUBJECT TO CHRONOLOGICAL ARRANGEMENT.

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GENERAL LAWS.

INTRODUCTORY.

§ 1. Rights and remedies.

The present treatise is a statement of the law relating to pleading and practice, as set forth in the statutes and judicial decisions of the state of New York. Before entering on the consideration of any specific matter, it is well to set forth a few definitions and determine, if possible, what is meant by practice.

First, of rights. Rights are classified as antecedent[1] and remedial rights. The former exist irrespective of any wrong having been committed while the latter are given by way of compensation when an antecedent right has been violated.[2] Thus the duty or obligation to forbear from personal injury is an antecedent or primary one; but the duty or obligation to pay a man damages for injury done to his person is remedial, secondary or sanctioning. The right which corresponds to a primary relative duty or obligation is called a primary or antecedent right. The right which corresponds to a remedial, secondary or sanctioning duty is called a remedial, secondary or sanctioning right.[3] Antecedent rights are divided into rights in rem and rights in personam according to whether they are available against the whole world or only a definite individual. Remedial rights are usually available only in personam.[4]

Second, of law. Law is divided into substantive law and adjective law. The former defines the rights of individuals while the latter indicates the procedure by which such rights are to be enforced.[5] In other words, substantive law is that portion of the body of the law which contains the rights and duties and the regulations of government as opposed to that

1 Mr. Pomeroy calls these rights primary rights.
2 Holland's Elements of Jurisprudence, 148.
3 3 Bl. Comm. (Hammond's Ed.) 190.
4 Id.
5 Holland's Elements of Jurisprudence, 148.

part which contains the rules and remedies by which the substantive law is administered.[6] The law of rights and wrongs would be of no practical use in the absence of law relating to the remedy given to persons whose right has been taken away as against the person causing the injury. "Adjective law," better known as "procedure" or "remedial law," comprises not only the rules for enforcing a remedial right, but also the rules for selecting the jurisdiction which has cognizance of the matter in question, ascertaining the court which is appropriate for the decision of the matter, setting in motion the machinery of the court so as to procure the decision, and setting in motion the physical force by which the judgment is to be rendered effectual.[7] The exact boundary between substantive and adjective law is difficult of definition, and has been the cause of much discussion.

Third, of remedies. The rule is that where there is a legal right there is also a legal remedy by suit or action at law whenever the right is invaded.[8] The Code does not define a remedy except in so far as a definition can be drawn from the distribution of all remedies into actions and special proceedings. It seems to regard, however, every original application to a court of justice for a judgment or an order as a remedy.[9] The word "remedies" has no precise meaning but is commonly used in several different senses. The most general meaning given to the term corresponds to the means by which rights are enforced such as actions, special proceedings, motions, etc.[10] In other words, it is the procedure whereby the redress is secured as distinguished from the right to be enforced.[11] Thus actions are sometimes considered in the light of the remedy itself instead of as to the instruments whereby the remedy is obtained. Remedies considered in this broad sense, divide themselves into redress of private wrongs by the mere act of the parties, redress by the mere operation of the

[6] Cyc. Law Dict. 879.

[7] Holland's Elements of Jurisprudence, 315, 316.

[8] 3 Bl. Comm. 23.

[9] Matter of Cooper, 22 N. Y. 67, 87; Belknap v. Waters, 11 N. Y. (1 Kern.) 477.

[10] Cyc. Law Dict. 789.

[11] Penneman's Case, 103 U. S. 717.

law, and redress by a proceeding in a court.[12] The term is also used as synonymous with the judgment. Or "remedies" may denote those judgments executed and performed by which the party has received the very benefit to which he was entitled,—the sum of money, the possession of the land or of the chattels, the execution and delivery of the deed, the cancellation of the agreement, the removal of the obstruction, or whatever else was ordered to be done by the opposite party.[13] As defined by Mr. Pomeroy, remedies, in their widest sense, are either the final means by which to maintain and defend primary rights and enforce primary duties, or they are the final equivalents given to an injured person in the place of his original primary rights which have been broken, and of the original primary duties towards him which have been unperformed.[14] Remedial rights are rights which an injured person has to avail himself of some one or more of these final means, or to obtain some one or more of these final equivalents.[15] Remedial duties are secondary duties, devolving on the party who has infringed upon the primary rights of another, and failed to perform his own primary duties towards that other, to make the reparation provided by some one or more of these final means, or furnish him some one or more of these equivalents.[16] When the primary rights and duties are public, that is, when they govern the relations alone of the state with individuals, the remedies for the violation thereof are public, and the larger portion of them are criminal. When the primary rights and duties are private, that is, when they are confined to the relations of individuals with each other, the remedies are also private, or, as frequently termed, civil.[17] The legislature may provide a remedy where a right exists without a remedy, or may change remedies so long as it does not substantially impair them,[18] but the legislature cannot change a remedy so as to create a new obligation or to at-

12 3 Bl. Comm.
13 Pom. Code Rem. (3d Ed.) §§ 67, 69, 70.
14 Pom. Code Rem. (3d Ed.) § 2.
15 Pom. Code Rem. (3d Ed.) § 2.
16 Pom. Code Rem. (3d Ed.) § 2.
17 Pom. Code Rem. (3d Ed.) § 3.
18 People ex rel. Witherbee v. Board Super's of County of Essex, 70

tach a new disability retrospectively, nor can it change a remedy so as to impair the obligation of a contract.

Fourth, of practice. Practice is defined as the form, manner, and order of conducting and carrying on suits or prosecutions in the courts through their various stages, according to the principles of law and the rules laid down by the respective courts.[19]

§ 2. Scope of work.

This work is intended to include all questions of pleading and practice which have arisen in the courts of record of the state of New York and which are not now obsolete by reason of a change of the statutes. It covers, inter alia, substantially the same ground covered by the Code of Civil Procedure except the procedure in the city courts, surrogates' courts, and courts of justices of the peace. Forms have been introduced in connection with the reading matter with the intention of including those in general use in practice.

§ 3. Chapter scheme.

Realizing that the New York lawyer has become thoroughly accustomed to the arrangement of the Code of Civil Procedure, an attempt has been made to follow the scheme used therein, where it does not conflict with the predominant idea in this book which is to take up the steps of an action one by one in the order in which such steps are taken in the prosecution of an action.

This work is first divided into three divisions, which are called books. Book I treats of general practice, Book II treats of practice relating to special actions or proceedings, and Book III covers appellate practice. Book I, which relates to general practice, is intended to cover all the steps in an action from the time the suit is commenced until the time when the judgment is actually enforced, and also to treat of matters to be considered before the institution of proceedings. Book I is divided into twelve parts.

N. Y. 228; People ex rel. Reynolds v. Common Council of City of Buffalo, 140 N. Y. 300. For further authorities, see Abb. Cyc. Dig. 649 et seq. Illustrations of rule will be found under chapters relating to "Jury," "Arrest," etc.

[19] Cyc. Law. Dict. 712.

Part one is devoted to matters to be considered before the institution of proceedings, and includes a brief discussion as to the nature and kinds of actions and proceedings, the steps preliminary to the commencement of an action, an enumeration of the courts of the state and their jurisdiction together with their officers and their duties, the statute of limitations the county in which to bring suit, and the parties to the action.

Part two includes the general rules of practice which relate to actions generally but are not subject to chronological arrangement. This part corresponds to a large extent to the chapter of the Code which is entitled "Miscellaneous Interlocutory Proceedings and Regulations of Practice." It embraces general rules relating to affidavits and oaths, motions and orders, notices and papers, service of papers, general regulations respecting bonds and undertakings, general regulations respecting time and the computation thereof, and the general Code rules relating to mistakes, omissions, defects, and irregularities.

In part three the rules relating to the commencement of actions by summons are considered, together with the law relating to appearances.

Part four is taken up with the subject of pleading, wherein the general rules relating to pleading are stated and discussed.

Part five includes provisional remedies such as preliminary injunctions, attachment, arrest, receivers, etc., and corresponds to chapter seven of the Code.

In part six the proceedings after the commencement of the action and before the trial, other than those relating merely to the pleadings or to provisional remedies, are considered. In this part are included the rules relating to calendar practice, the consolidation and severance of actions, depositions, discovery and inspection, obtaining leave to sue as a poor person, security for costs, stay of proceedings, changing place of trial, removal of cause to another court, procuring attendance of witnesses, postponement of trial, appointment of guardian ad litem for defendant, etc.

Part seven takes up questions relating to the termination of the action without a trial as where defendant fails to plead or there is a discontinuance or dismissal.

Part eight includes the law applicable to the trial itself,

while part nine is devoted to new trial, part ten to the rules relating to costs and fees, part eleven to judgments, and part twelve to the enforcement of judgments and orders which includes executions, creditors' suits, supplementary proceedings, judicial sales, writs of assistance, and contempt proceedings.

Book II, which relates to special actions or proceedings, is divided into ten parts, and follows very closely the division fixed by the Code chapters and titles. Part one includes the practice in actions relating to real estate as enumerated in chapter fourteen of the Code. Part two is devoted to actions relating to chattels as enumerated in chapter fourteen of the Code. Part three takes up particular actions which were formerely suits in equity, but which are now governed by Code provisions. It includes actions to cancel or reform written instruments, actions to compel specific performance, and injunction suits. Part four includes matrimonial actions as included in title one of chapter fifteen of the Code. Part five relates to actions on bonds and undertakings. Part six includes actions in behalf of the people as enumerated in title one of chapter 16 of the Code. Part seven includes special proceedings instituted by state writ, such as mandamus, prohibition, habeas corpus, etc., as enumerated in title two of chapter sixteen of the Code. Part eight takes up the practice relating to actions and proceedings by, against, or between particular persons, associations, and corporations, such as actions by, or against corporations, joint stock associations, partners, husband and wife, executors and administrators, infants, etc. Part nine corresponds to chapter seventeen of the Code which relates to special proceedings instituted without writ, and includes insolvency proceedings, summary proceedings to recover real property, contempt proceedings, arbitrations, proceedings to foreclose a mortgage by advertisement, etc. Part ten, which is the concluding part, is intended to cover the rules relating to certain miscellaneous actions and proceedings not capable of classification under any of the preceding parts.

Book III covers appellate jurisdiction and practice. This very important branch of practice has never been adequately treated and it is intended to treat it fully as a separate and distinct part of practice.

BOOK I.

GENERAL PRACTICE.

PART I.

MATTERS TO BE CONSIDERED BEFORE INSTITUTION OF PROCEEDINGS.

CHAPTER I.

NATURE AND KIND OF, AND GENERAL RULES RELATING TO, JUDICIAL PROCEEDINGS.

ART. I. KINDS OF PROCEEDINGS IN GENERAL.

Chapter Analysis.

Chapter Analysis.

ART. I. KINDS OF PROCEEDINGS IN GENERAL.

§ 4. General considerations.

Proceedings to enforce violated rights may be divided into actions and special proceedings. An action is an ordinary prosecution in a court of justice by one person against another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense.[1] It includes all proceedings in the court up to the final termination of the litigation, whether instituted by a party, by a third person, or by the court of its own motion.[2]

Actions are divided into civil and criminal actions. A criminal action is prosecuted by the people of the state, as a party, against a person charged with a public offense, for the punish-

1 Code Civ. Proc. § 3333; Backus v. Stillwell, 3 How. Pr., 318.
2 Cyc. Law Dict. 21.

ment thereof,[3] while every other action is a civil action.[4] Criminal actions will not be treated of in this work.

Civil actions may be divided into personal actions, actions relating to real property, and actions relating to personal property. Personal actions are such whereby a man claims a debt or personal duty or damages in lieu thereof; and likewise whereby a man claims a satisfaction in damages for some injury done to his person or property: the former are said to be founded on contract and the latter on torts or wrongs.[5]

The Code enumerates and specially provides for the following actions as actions relating to real property:

1. Action to recover real property.
2. Action for partition.
3. Action for dower.
4. Action to foreclose a mortgage.
5. Action to compel determination of a claim to real property.
6. Action for waste.
7. Action for a nuisance.
8. Action against certain persons holding over after their estate has expired.
9. Action by remainderman or reversioner for injury done to the inheritance.
10. Action by joint tenant or tenant in common to recover proportion of proceeds as against co-tenant.
11. Action for cutting down or carrying away trees.
12. Action for forcible entry or detainer.[6]

Actions relating to chattels are classified by the Code as actions to recover a chattel and actions to foreclose a lien upon a chattel.[7]

Actions are further divisible into actions in personam and actions in rem, and local and transitory actions. A local action is one which must be brought in some particular locality,

[3] Code Civ. Proc. § 3336.

[4] Code Civ. Proc. § 3337. An action in the nature of a quo warranto is a civil action. People v. Cook, 8 N. Y. (4 Seld.) 67.

[5] 3 Bl. Comm. 117.

[6] Code Civ. Proc. §§ 1496-1688.

[7] Code Civ. Proc. §§ 1689-1741.

whether that place be fixed by common law or by statute, while a transitory action is one which may be brought in any county which the plaintiff may prefer. The distinction between local and transitory actions will be noticed in detail in connection with the discussion as to jurisdiction of state courts in general[8] and the question as to the county in which an action must be brought.[9] An action in personam is one in which the proceedings are against the person. A proceeding in rem is primarily to determine the status of the subject-matter, be it of a person or of a thing, or to subject specific property to an obligation with no attempt to recover a personal judgment. A proceeding in rem is generally non-adversary,—jurisdiction being obtained by virtue of the location of the property.

So actions based on an equitable right or relating to an equitable remedy are separable from actions based on legal right or to obtain a legal remedy.

Actions are further distinguishable from proceedings to obtain a judgment without process or pleading which include (1) confession of judgment, (2) submission on agreed statement of facts, and (3) arbitration proceedings.

§ 5. Special proceedings.

The Code provides that an ordinary prosecution in a court of justice by one person against another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense is an action,[10] and every other prosecution by a party for either of the purposes before specified is a special proceeding.[11] "Ordinary proceedings,"

[8] See post, chapter on place of trial, §§ 135, 136.

[9] Id.

[10] Code Civ. Proc. § 3333. The word "action," as used in the Codes, includes suits in equity (Bank of Commerce v. Rutland & W. R. Co., 10 How. Pr. 1) while before the Codes the word "action" designated a proceeding at law, and the word "suit" applied either to a proceeding at law or in equity, though usually to the latter (Didier v. Davison, 10 Paige, 515; Hall v. Bartlett, 9 Barb. 297).

[11] Code Civ. Proc. § 3334. "Remedies for the enforcement of rights are divided into two classes, viz., actions and special proceedings. Each has its peculiar and distinguishing characteristics. Where an action is the appropriate remedy, it does not include a special pro-

as the term is used in this Code provision, is intended to designate those proceedings which are instituted by summons and complaint,[12] and therein lies the principal difference between an action and a special proceeding. A proceeding may be a special proceeding as well where the right of the parties is created by the Revised Statutes as where created by the Code itself.[13] A special proceeding and a motion have sometimes been confused. The difference between them is that the one is an application in a proceeding already pending or about to be commenced, on which it depends for jurisdiction, while the other is an independent prosecution of a remedy, in which jurisdiction is obtained by original process.[14] The importance of determining whether a proceeding is an action or a special proceeding, outside of the question of difference in costs, rests in the fact that some of the Code provisions expressly state that the rule laid down is applicable only to actions, or only to special proceedings.[15] For instance, it is

ceeding, unless by express provision of law. A prosecution for the enforcement of a right must be either by action or special proceeding. In certain cases the prosecution may be by either, but cannot be by both. To constitute a special proceeding, the original prosecution must be commenced thereby and not commenced by action. When a prosecution is begun by action, the subsequent proceedings therein must be regarded as in and incidental to the action, and not as independent and original proceedings." People v. American Loan & Trust Co., 150 N. Y. 117.

12 Belknap v. Waters, 11 N. Y. (1 Kern.) 477.

13 Hallock v. Bacon, 21 Civ. Proc. R. (Browne) 255.

14 Matter of Lima & H. F. Ry. Co., 68 Hun, 252. An application for interpleader by a savings bank under the general savings bank act, in an action against it, is a motion and not a special proceeding. Bowery Sav. Bank v. Mahler, 45 Super. Ct. (13 J. & S.) 619. So settling the account of a foreclosure receiver and refusing to direct the attorney for a sequestration receiver to pay over to the former the money in his hands, is merely an intermediate order in the action. New York Security & Trust Co. v. Saratoga Gas & Electric Light Co., 156 N. Y. 645.

15 Sections 870-920 of the Code relating to depositions and examination of parties before trial, apply only to actions and special proceedings before a surrogate.

Sections 803-809 providing for the discovery of books and papers, relate only to actions.

Chapter 4 relating to the limitation of the time of enforcing a civil

provided that a civil "action" shall be commenced by the service of a summons[16] and it has been held that a proceeding not commenced by summons is not an action.[17] The hearing in a special proceeding must be brought on by motion on a notice of eight days, unless a shorter time is prescribed by an order to show cause, which rests in the discretion of the court.[18]

Special proceedings instituted by state writ, as enumerated in the Code, include the following:

1. The writ of habeas corpus to bring in a person to testify.
2. The writ of habeas corpus, and the writ of certiorari, to inquire into the cause of detention.
3. The writ of mandamus.[19]
4. The writ of prohibition.
5. Writ of assessment of damages.
6. Writ of certiorari to review the determination of an inferior tribunal.[20]

The Code enumerates the following special proceedings which may be instituted without a writ:

1. Proceedings relating to insolvent debtors.
2. Proceedings to recover possession of real property.
3. Proceedings to punish for contempt of court other than a criminal contempt.[21]

remedy, is made applicable to special proceedings by section 414 which provides that the word "action" contained in the chapter is to be construed when it is necessary so to do, as including a special proceeding or any proceeding therein or in an action.

Sections 789-795 providing for preferences on court calendar, seem to apply to both actions and special proceedings.

Sections 796-802 relating to service of papers, in effect are limited to service of papers in an action.

Sections 852, 853 providing for the issuance and service of subpoenas, applies to actions; sections 854-856 providing for subpoenas apply to special proceedings. The distinction is also important in regard to appeals to the court of appeals.

[16] Code Civ. Proc. § 416.

[17] McLean v. Jephson, 26 Abb. N. C. 40. But see People ex rel. Bendon v. County Judge of Rensselaer, 13 How. Pr. 398.

[18] Matter of Cutting, 49 App. Div. 388.

[19] People ex rel. Nelson v. Marsh, 81 N. Y. Supp. 579; People ex rel. Sheridan v. French, 13 Abb. N. C. 413.

[20] Code Civ. Proc. §§ 1991-2148.

[21] People ex rel. Woolf v. Jacobs, 5 Hun, 428; Erie Ry. v. Ramsey,

4. Proceedings to collect a fine.
5. Proceedings to discover the death of a tenant for life.
6. Proceedings for the appointment of a committee for a lunatic or habitual drunkard.
7. Proceedings for the disposition of the real property of an infant, idiot, lunatic, or habitual drunkard.
8. Arbitrations.
9. Proceedings to foreclose a mortgage by advertisement.
10. Proceedings for the voluntary dissolution of a corporation.
12. Proceedings supplementary to an execution against property.
13. Proceedings to compel delivery of books to a public officer.[22]

In addition to the above named proceedings expressly designated as special proceedings may be mentioned condemnation and like proceedings;[23] proceedings to compel assignee to

45 N. Y. 637; Hart v. Johnson, 7 State Rep. 133; Sudlow v. Knox, 7 Abb. Pr., N. S., 411.

Proceedings for criminal contempt are not special proceedings, because special proceedings are civil. People ex rel. N. Y. Soc. for Prevention of Cruelty to Children v. Gilmore, 88 N. Y. 626.

Furthermore, a proceeding to punish for contempt to enforce a civil remedy, where instituted by an order to show cause, is a proceeding or order in the action and not a special proceeding. Pitt v. Davison, 37 N. Y. 235; Ray v. New York Bay Extension R. Co., 155 N. Y. 102; Jewelers' Mercantile Agency v. Rothschild, 155 N. Y. 255.

[22] Code Civ. Proc. §§ 2149-2471a.

[23] Matter of Waverly Water-Works, 16 Hun, 57; Matter of Board of Education of City of Brooklyn, 19 Civ. Proc. R. (Browne) 420; Matter of Broadway & 7th Ave. R. Co., 69 Hun, 275; Matter of City of Brooklyn, 148 N. Y. 107; Matter of Grade Crossing Com'rs, 20 App. Div. 271. Proceedings by N. Y. City under consolidation act. Matter of Mayor, etc., of City of N. Y., 22 App. Div. 124, 127. Proceedings by street surface railroad company to extend its lines. Hornellsville Electric R. Co. v. New York, L. E. & W. R. Co., 83 Hun, 407, 412; Matter of Cortland and Homer Horse Railway Co., 98 N. Y. 336, 341. Proceedings to open a street. Matter of Opening of One Hundred and Sixty-Third Street, 61 Hun, 365, 366. Proceedings to extend a street. Matter of Mayor, etc., of City of N. Y., 27 State Rep. 188; Matter of South Market St., 80 Hun, 246. Local improvement proceedings. King v. City of New York,

deliver property;[24] proceedings on appeal to referees in highway litigations;[25] application by attorney for admission to the bar;[26] proceeding to enforce attorney's lien;[27] probate proceedings;[28] proceeding for settlement of accounts of trustee;[29] proceeding by trustee under a will for leave to resign and for appointment of a new trustee;[30] proceedings for removal of testamentary guardian;[31] proceedings under the Election Law;[32-34] application for an order requiring a receiver to pay out money;[35] application to enforce the statutory liability for costs of an assignee of a cause of action, or one beneficially interested in the recovery;[36] reference to determine rights in surplus after foreclosure;[37] or reference after judgment in foreclosure;[38] proceeding to establish mortgage lien on shares on part of defendants in partition after interlocu-

36 N. Y. 182, 186; Matter of Manhattan Sav. Inst., 82 N. Y. 142; Matter of Yetter, 78 N. Y. 601; Matter of Fowler, 53 N. Y. 60; Matter of Protestant Episcopal Public School, 86 N. Y. 396. Proceedings to assess damages under General Railroad Act. New York Cent. R. Co. v. Marvin, 11 N. Y. (1 Kern.) 276; Matter of Renselear & Saratoga Ry. Co., 55 N. Y. 145, 43 N. Y. 137, 147. Application by railroad company for authority to construct its road on street in incorporated village. Matter of Lima & H. F. R. Co., 68 Hun, 252.

[24] Potter v. Durfee, 8 State Rep. 261, 264.

[25] People ex rel. Martin v. Albright, 23 How. Pr. 306, which, though not specifically so deciding, in effect overrules People ex rel. Harvey v. Heath, 20 How. Pr. 304, which holds the proceeding not a special proceeding.

[26] Matter of Cooper, 22 N. Y. 67, 86.

[27] Peri v. New York Cent. & H. R. R. Co., 152 N. Y. 521, 526; Matter of Fitzsimons, 174 N. Y. 15.

[28] Matter of Gates, 26 Hun, 179, 181.

[29] Matter of Simpson, 26 Hun, 459; Matter of Livingston, 34 N. Y. 555. Special Guardian. Spelman v. Terry, 74 N. Y. 448, 451. Executor. Matter of Lewis, 36 Misc. 741.

[30] Matter of Holden, 126 N. Y. 589, 592.

[31] Matter of King, 42 Hun, 607, 608.

[32-34] Matter of Mitchell, 81 Hun, 401, 402; Matter of Ward, 48 State Rep. 613, 615 (dicta); Matter of Emmet, 150 N. Y. 538, 541.

[35] People v. City Bank of Rochester, 96 N. Y. 32, 37.

[36] Marvin v. Marvin, 78 N. Y. 541.

[37] Matter of Gibbs, 58 How. Pr. 502, 504.

[38] Elwell v. Robbins, 43 How. Pr. 108.

tory judgment for a sale of the premises;[39] motion to set aside confession of judgment for defect in statement;[40] proceedings to enforce a judgment by attachment as for contempt;[41] proceeding to compel an attorney to pay over surplus moneys arising from a foreclosure sale;[41a] proceedings for leave to mortgage trust lands;[41b] contest as to leave to issue judgment on an execution;[42] petition for leave to sue a lunatic to recover a debt;[43] application by overseers of the poor to compel the support of poor relations;[44] proceedings to remove a justice of the peace;[45] proceedings under the "General Municipal Law" by resident freeholders of a village, who claim that its officers are unlawfully expending the moneys raised by taxation therein, and ask for an investigation;[46] petition to compel a specific performance by infant heirs, of a contract for sale of land;[47] proceeding to change the place of trial of a criminal action;[48] application in surrogate court to assess transfer tax.[48a] On the other hand, the following have been held not special proceedings: Application to direct the permanent receiver of a corporation appointed by final judgment, to pay the claim of a creditor;[49] proceeding for order for the examination of witnesses before trial, after action has been brought;[50] appli-

[39] Byrnes v. Labagh, 12 Civ. Proc. R. (Browne) 417.

[40] Belknap v. Waters, 11 N. Y. (1 Kern.) 477.

[41] Holstein v. Rice, 15 Abb. Pr. 307, 312; Gray v. Cook, 15 Abb. Pr. 308.

[41a] Matter of Silvernail, 45 Hun, 575.

[41b] Matter of Clarke, 27 Abb. N. C. 144.

[42] Ithaca Agricultural Works v. Eggleston, 107 N. Y. 272, 276.

[43] Williams v. Estate of Cameron, 26 Barb. 172, 176.

[44] Haviland v. White, 7 How. Pr. 154, 157.

[45] Matter of King, 130 N. Y. 602, 606.

[46] People ex rel. Guibord v. Kellogg, 22 App. Div. 176; Matter of Town of Hempstead, 32 App. Div. 6.

[47] Hyatt v. Seeley, 11 N. Y. (1 Kern.) 52, 55.

[48] People v. McLaughlin, 2 App. Div. 408. It would seem, however, that special proceedings apply only to civil suits.

[48a] Matter of Babcock, 86 App. Div. 563.

[49] People v. American Loan & Trust Co., 150 N. Y. 117, 125.

[50] Matter of Attorney General, 155 N. Y. 441, 444.

cation to revoke an approval of an order of the state commission in lunacy;[51] scire facias proceedings;[52] submission of controversy on agreed facts;[53] application to appoint a successor to a deceased testamentary trustee.[54]

Proceedings to enforce a claim against a decedent's estate, after a reference thereof, are made actions, and not special proceedings, by Laws 1893, c. 686, which amended Code Civil Procedure, § 2718.[55]

§ 6. Legal and equitable causes of action and remedies.

In 1848 the New York Code of Procedure was adopted, which provided that "the distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing are abolished; and there shall be in this state hereafter but one form of action for the enforcement or protection of private rights and the redress of private wrongs which shall be denominated a civil action."[56] In 1876 the Code of Civil Procedure was adopted which contained practically the same provision.[57] The civil action created by the Codes is a substitute for all such proceedings as were previously known either as actions at law or suits in equity. The courts of New York were, at first, loath to give full effect to this rule. They held that the distinction between law and equity was inherent, and hence could not be abrogated.[58] But while this is true, it does not affect the abolishment of the differences between the actions to enforce such inherent rights. Equity is a distinct department of the municipal law, and consists in part of primary rules and rights flowing therefrom different from the legal rules and rights relating to the same subject-matter, and in part of the special remedies and reme-

[51] Matter of Board of Charities, 76 Hun, 74.

[52] Cameron v. Young, 6 How. Pr. 372.

[53] Code Civ. Proc. § 1280.

[54] Losey v. Stanley, 83 Hun, 420.

[55] Lee v. Lee, 85 Hun, 588; Paddock v. Kirkham, 102 N. Y. 597, to the contrary, was decided before 1893.

[56] Code Proc. § 69.

[57] Code Civ. Proc. § 3339.

[58] Booth v. Farmers' & Mechanics' Nat. Bank, 65 Barb. 457.

dial rights.[59] To clearly understand the effect of the Code, it is necessary to keep in mind that equitable rights and duties are one thing, equitable remedies another thing, and suits in equity still another different matter. The first two are not affected by the Code provision. Equitable rights and duties are the same as they were before the Code, and so are equitable remedies; i. e. the relief granted.[60] While the distinction between actions at law and suits in equity are abolished so far as the course of proceedings therein is concerned, the principles by which the rights of the parties are to be determined, remain unchanged. The Code has given no new cause of action.[61] The union of the systems of law and equity practice does not enlarge the powers of the court either as to legal or equitable jurisdiction, which is well illustrated by the case of an injunction which cannot be granted where there is an adequate remedy at law.[62] But all distinctions between the "actions" formerly used to enforce equitable rights and obtain equitable remedies, and those used to enforce legal rights and obtain legal remedies, are removed.[63] All the differences which belonged to the external machinery by which a judicial controversy was conducted up to the judgment itself, all the rules respecting forms of action, all the peculiar characteristics of a legal or of an equitable action, or of the various kinds of legal actions, except the constitutional requirement as to the jury trial, have been swept away. One action, governed in all instances by the same principles as to form and methods, suffices for the maintaining of all classes of primary rights, and for the pursuit of all kinds of civil remedies.[64] The Codes do not assume to abolish the distinctions between "law" and "equity" regarded as two complementary departments of the municipal law.[65] Equitable, as distinguished from legal, causes of action still remain, but

[59] Pom. Code Rem. (3d Ed.) § 53.
[60] Pom. Code Rem. (3d Ed.) § 7.
[61] Cole v. Reynolds, 18 N. Y. 74.
[62] New York Life Ins. Co. v. Supervisors of City & County of N. Y., 11 Super. Ct. (4 Duer) 192.
[63] Pom. Code Rem. (3d Ed.) § 36.
[64] Id.
[65] Pom. Code Rem. (3d Ed.) § 68.

it is improper to speak of "legal actions" and "equitable actions."[66] At the present time, equitable primary rules are the same as legal rules relating to the same subject-matter except in a very few instances. In many instances, equitable primary rules and rights are simply additional to those recognized by the law, as in case of the equitable right to specific performance of a contract to convey land in addition to the legal right to recover damages for breach of the contract.[67] The peculiarity of equitable remedies, as compared with the kinds of relief given by the law courts, is undoubtedly the most prominent feature of equity, and such remedies are divided by Mr. Pomeroy, in his valuable work on Code Remedies, into three kinds, viz:

(1) Those which are utterly different from any that are known or used in the legal procedure;

(2) Those which the legal procedure recognizes and the benefits of which it obtains in an indirect manner;

(3) Those which are the same in substance and form, both in equity and law.[68]

Under the reformed procedure introduced by the Codes, legal and equitable causes of action may be united in the same complaint,[69] and equitable defenses may be interposed to actions brought to enforce legal rights and to obtain legal remedies,[70] and a legal remedy may be obtained on an equitable ownership or an equitable primary right, as in ejectment where recovery may be had on an equitable title.[71] So both a legal and equitable cause of action may be alleged and both a legal and equitable remedy obtained, or both a legal and equitable cause of action may be alleged and the single remedy obtained may be legal or equitable, or upon an equitable cause of action a legal remedy may be obtained, or upon a legal cause of action an equitable remedy may be obtained, or in a legal

[66] Id.

[67] Pom. Code Rem. (3d Ed.) § 48.

[68] Pom. Code Rem. (3d Ed.) §§ 49, 50.

[69] Code Civ. Proc. § 484.

[70] This rule is so well settled that it is deemed sufficient to refer to digest, 5 Abb. Cyc. Dig. 479.

[71] Pom. Code Rem. (3d Ed.) §§ 98-106; 5 Abb. Cyc. Dig. 470-472.

cause of action plaintiff may invoke an equitable right or title in aid of his contention and obtain his remedy by its means.[72]

The abolition of the distinction between actions at law and suits in equity does not, however, affect the distinction between the two sorts of proceedings so far as the federal courts are concerned, so that if a civil action is brought in a state court and it is essentially a common law action, then the common form and not the equitable one must be pursued if the case is removed into a federal court.[73]

The decision of the question whether the cause of action is legal or equitable is of importance in determining the right to a jury trial as a matter of course and in determining some other incidental proceedings. The question is to be determined by the allegations of the complaint and not by the prayer for relief,[74] but where the allegations of the complaint are such that either legal or equitable relief might be demanded and one is specifically asked for, the demand determines the nature of the action.[75]

[72] Pom. Code Rem. (3d Ed.) § 77.

[73] Thompson v. Railroad Co.'s, 6 Wall. (U. S.) 134.

[74] O'Brien v. Ottenberg, 59 State Rep. 379.

An action by an abutting owner for an injunction is not converted into a legal action by alleging a nuisance and asking that it be enjoined (Johnston v. Manhattan Ry. Co., 41 State Rep. 682, 61 Hun, 627) nor by including in the prayer for judgment a demand for past damages. Pegram v. New York Elevated Ry. Co., 147 N. Y. 135. An abutting owner's action is ordinarily partly legal and partly equitable in its nature. Syracuse Solar Salt Co. v. Rome, W. & O. R. Co., 67 Hun, 153.

An action for money had and received, though equitable in its nature, is nevertheless a common law action. Otis v. Crouch, 89 Hun, 548.

An order directing that the pleadings be amended so as to provide for a partnership accounting, and that the action be tried before a referee, is not conclusive as to the nature of the action, which is to be determined solely by the pleadings. White v. Rodemann, 44 App. Div. 503.

Collection of cases where the question was whether the action was equitable or legal will be found in 3 Abb. Cyc. Dig. 74, 75.

[75] O'Brien v. Fitzgerald, 143 N. Y. 377.

Mr. Andrews, in his valuable work on American Law, has classified the actions based on equitable rights as follows:

1. Suits to collect money
   - Accounting.
     - Between persons in fiduciary relationship.
     - Against persons under legal obligation to account.
     - Rents and profits.
   - Creditors' suits.
   - Bills to foreclose mortgages.
   - Bills to enforce contribution and subrogation.
2. Suits relating to enforcement of contracts
   - Specific performance.
   - Injunction.
     - Against breach of personal contract.
     - Against breach of contracts and covenants in deeds.
3. Suits to relieve from obligations.
   - Of contracts.
     - Rescission.
     - Cancellation.
     - Reformation.
   - Of judgments.
     - Correcting.
     - Setting aside.
     - Enjoining collection.
     - Bill of review.
   - Dissolution of marriage.
   - Divorce.
   - Separate maintenance.
4. Bills quia timet; suits providing for future contingencies and protecting executory interests
   - Bills to remove clouds.
   - Interpleader.
   - Bill of peace.
   - Against waste.
5. Bills relating to trusts
   - Pure trusts.
   - Arising from fiduciary relationship.
   - Tracing trusts funds.
   - Charities.
6. Suits relating to wills
   - To set aside.
   - To establish.
   - To construe.
   - To permit elections under.
7. Administration of estates.
8. Bills relating to dower and curtesy.
9. Dissolution of partnership.
10. Suits to restrain collection of taxes.
11. Bills of revivor.
12. Bill to prevent torts
    - Enjoining nuisance.
    - Preventing trespass.
    - Publication of libel.
    - Strikes and boycotts.
13. Bills to establish and enforce liens
    - Bailees.
    - Mechanics.
    - Vendors.

14. Bills to protect personal rights..... { Privacy. Infants and non compos persons.

15. Bills to partition land.

16. Bills of discovery.[76]

§ 7. Actions ex contractu and ex delicto.

At common law, personal actions were classified as ex contractu and ex delicto. The forms of actions based on contract were called assumpsit, debt, covenant, and detinue.

Assumpsit could be brought to recover damages for the nonperformance of a simple contract, i. e., a contract not under seal. The contract might be either express or implied. When brought on an express contract, the action was designated "special assumpsit." When brought on an implied contract, it was said to be "general assumpsit," in which case a general statement in the declaration in the form of one or more of the so-called common counts sufficed. The action was distinguished from the action of debt, in that the latter was brought for the recovery, not of damages, but debt; and from the action of detinue which was brought for the recovery, not of damages, but of a personal chattel in specie; and from the action of covenant which was only for the breach of a covenant or contract under seal.

An action of debt was so called because it was, in legal consideration, for the recovery of a debt eo nomine and in numero,[77] and though damages were generally awarded for the detention of the debt, yet, in most instances, they were merely nominal, and not, as in assumpsit and covenant, the principal object of the suit.[78]

The action of covenant was the proper form of action to recover damages for the breach of a covenant or contract under seal.

The action of detinue was formerly the only remedy by suit at law for the recovery of a personal chattel in specie except in those instances where the party could obtain possession by

[76] 1 Andrew's Am. Law, 1073.

[77] 1 Chit. Pl. 121.

[78] Id.

replevying the same and by action of replevin.[79] The action is classified by some as in form ex contractu and by others as in form ex delicto. It seems to belong almost, if not quite, as much to one class as to the other.

The personal actions in form ex delicto and which were principally for the redress of wrongs unconnected with contract, were case, trover, replevin and trespass vi et armis.

The action of trespass on the case was the appropriate action for all personal wrongs and injuries without force,—that is, injuries, not in legal contemplation forcible, or not direct and immediate on the act done, but only consequential.[80] In its most comprehensive signification, it included assumpsit as well as an action in form ex delicto, and it was said to lie where a party sued for damages for any wrong or cause of complaint to which covenant or trespass would not apply.[81] Assumpsit, however, was not regarded as an action ex delicto. The action of trespass on the case was so called because the plaintiff's whole case or cause of complaint was set forth at length in the original writ.[82] At common law if none of the ancient forms of writs collected and preserved in the register of writs was adapted to the nature of the plaintiff's case, he was nevertheless at liberty to bring a special action on his own case, to accord with which new forms of writs were formed by the officers of the court of chancery. But as these officers were found reluctant to perform this duty or doubted their authority in new cases to frame the proper remedy, the statute of Westminster II was enacted which provided, "that, as often as it shall happen in the chancery that in one case a writ is found, and in a like case, falling under the same right, and requiring like remedy, no writ is to be found, the clerks of the chancery shall agree in making a writ, or adjourn the complaint till the next parliament, and write the cases in which they cannot agree and refer them to the next parliament; and by consent of men learned in the law, a writ shall be made lest it might happen after that the court should long

[79] 1 Chit. Pl. 136.
[80] 3 Bl. Comm. 122.
[81] 1 Chit. Pl. 140.
[82] 3 Bl. Comm. 122.

time fail to minister justice unto complainants."[83] This statute did not give nor recognize any right to form new writs in cases entirely new. But on the other hand, new writs were copiously produced according to the principle sanctioned by this act; i. e. in like cases or upon the analogy of actions previously existing. The injuries for which new writs were thus invented were considered as bearing a certain analogy to a trespass, and the writs accordingly received the appellation of "writs of trespass on the case," as being founded on the particular circumstances of the case requiring a remedy, and to distinguish them from the old writ of trespass. The injuries themselves which were the subject of such writs, are not called trespasses, but have the general name of torts, wrongs or grievances. An action on the case was appropriate to obtain legal redress for libel or slander, malicious prosecution, seduction, and negligence.

The action of trover, or conversion, was, in its origin, an action of trespass on the case for the recovery of damages against a person who had found goods and refused to deliver them on demand to the owner, but converted them to his own use; from which word "finding," (trover) the remedy was called an "action of trover." By a fiction of law, actions of trover were at length permitted to be brought against any person who had in his possession, by any means whatever, the personal property of another and sold or used the same without the consent of the owner, or refused to deliver the same when demanded. The injury consisted of the conversion and deprivation of the plaintiff's property,—the gist of the action. In general it was an action for the recovery of damages to the extent of the plaintiff's right, as against the defendant, in the thing converted, and not for the specific recovery of the thing itself which was the purpose of the action of replevin and formerly of the action of detinue.[84]

The action of replevin was used to recover the possession of goods taken from the plaintiff by another and was in the detinet or in the detinuet; the former where goods were still detained by the person who took them, and the latter, as the

[83] 1 Chit. Pl. 107.
[84] 1 Chit. Pl. 164.

word imports, when the goods had been delivered to the plaintiff.[85] The action is designated in the Code as, "an action to recover a chattel,"[86] and is often spoken of as an action of claim and delivery.

An action of trespass vi et armis was proper to recover damages for an injury, the immediate and not mere consequential result of an act committed with violence.

—— **Effect of Code.** The Code abolished the "form" of all actions at law. Hence there is now no such thing as an action of assumpsit as distinguished from an action on the case, etc., although the terms are retained to some extent to indicate the nature of the action. The effect of the Code in abolishing the forms of actions at law, in so far as pleading is concerned, is to do away with set forms of expression as used at common law and instead to require a statement of the material facts relied on in clear and concise language, without unnecessary repetition. But it should be remembered that the substantive distinctions between actions based on a contract and those founded in tort, still exist.[87] While forms of action are abolished, the principles by which the different forms of action were governed at common law still remain, and now as much as formerly control in determining the rights of the parties.[88] And furthermore, the Code has had the effect of increasing the importance of the distinction between causes of action based on contract and those founded in tort since many of its provisions refer specifically to "actions on contracts" or "actions based on a tort," as separate and distinct classes of actions, and since some of the common law forms of action, as already stated, were applicable to both causes of action on contract and on tort. So while the forms of action known as assumpsit, trover, etc., have been abolished, the line is drawn between actions ex contractu and actions ex delicto and the practice therein differentiated to

[85] 1 Chit. Pl. 182.

[86] Code Civ. Proc. § 1690.

History of the action of replevin in this state will be found in Manning, Bowman & Co. v. Keenan, 73 N. Y. 45, 61.

[87] Austin v. Rawdon, 44 N. Y. 63, 71.

[88] Eldridge v. Adams, 54 Barb. 417.

some extent. The result is that while, for instance, the distinction between trover and assumpsit is abolished, yet it still exists on the contract and tort division in that an amendment will not be allowed on the trial to change the action from the one to the other or vice versa. So the importance of determining whether a cause of action is ex contractu or ex delicto, results from the fact that subsequent proceedings, such as the right to arrest, body execution, joining causes of action in the complaint, pleading of counterclaims, costs, etc., may depend on the solution of such question. In determining whether it is better to sue on contract or in tort, it must also be remembered that the liability for breach of contract is less extensive than that for a tort, inasmuch as the measure of damages is different,[89] and that the judgment in an action on contract may have a different effect from a judgment in an action based on a tort. For instance, a judgment for a breach of contract, though followed by payment, does not transfer title to the subject-matter involved, while a judgment in trover for conversion will, after payment, effect a change of ownership by operation of the law.[90]

Every private wrong must be founded on a contract, a quasi-contract, or on a tort. The common definition of a tort as a "wrong unconnected with contract" implies that tort is a breach of some general rule imposed by the law and not of an obligation undertaken by the will of the person bound. Whether an action is founded on the breach of a contract or on the breach of a duty imposed by law depends on whether the duty, for the breach of which the action is brought, exists solely because of a contract between the parties or would be implied in law by reason of the relation of the parties. But notwithstanding the difference between a contract and a tort is clear, it is oftentimes difficult to determine whether the pleader has intended to state a cause of action based on a contract or on a tort, as where allegations based on contract are commingled with allegations based on a tort or where the pleader has the option of suing on the tort or waiving the tort and suing on an implied contract.[91] Thus if one has taken pos-

[89] May v. Georger, 21 Misc. 622.

[90] Thurst v. West, 31 N. Y. 210; May v. Georger, 21 Misc. 622.

[91] "Between actions plainly ex contractu and those as clearly ex

session of property and converted it into money, the owner may affirm the sale as made on his behalf and demand the benefit of the transaction as based on an implied contract,[92] and it is not necessary that the wrongdoer has sold the goods, where he has used them for his own benefit, changing their form and character.[93] It is also important to keep in mind the rule that if the act producing the injury be in itself tortious, the action therefor may be based on the tort though the injury is charged to have also been in violation of a contract.[94]

Under the old Code the nature of the action could be determined to some extent by an inspection of the summons in that the notice in the summons of judgment to be taken in case of default was different in actions arising on contract from that in other actions.[95] But under the present Code there is one form of summons so that no aid can be derived there-

delicto there exists what has been termed a border-land, where the lines of distinction are shadowy and obscure, and the tort and the contract so approach each other, and become so nearly coincident as to make their practical separation somewhat difficult. * * * It is then doubtless true that a mere contract obligation may establish no relation out of which a separate or specific legal duty arises, and yet extraneous circumstances and conditions, in connection with it, may establish such a relation as to make its performance a legal duty, and its omission a wrong to be redressed." Rich v. New York Cent. & H. R. R. Co., 87 N. Y. 382.

Words which are neither issuable nor material, and which are merely descriptive of the manner, purpose, or feeling with which the material acts of the parties are done, do not determine whether the action is ex delicto or ex contractu. People ex rel. Hogan v. Haberstro, 16 Alb. L. J. 151.

92 Sturtevant v. Waterbury, 2 Super. Ct. (2 Hall) 484; Hinds v. Tweddle, 7 How. Pr. 278; Rothschild v. Mack, 115 N. Y. 1; Harpending v. Shoemaker, 37 Barb. 270; Wile v. Brownstein, 35 Hun, 68. For a full discussion of the question as to waiver of tort and suit in assumpsit, see "Keener on Quasi-Contracts."

93 Roth v. Palmer, 27 Barb. 652; Abbott v. Blossom, 66 Barb. 353. Cases in other states hold that the wrongdoer must have parted with the goods and received money.

94 Sheldon v. Steamship Uncle Sam, 18 Cal. 527; Ward v. St. Vincent's Hospital, 23 Misc. 91.

95 Code Pro. § 129.

from.[96] The prayer for relief in the complaint may, however, sometimes determine the question, where otherwise involved in doubt.[97]

—— **Actions based on contract, with charge of conversion.** The question often arises where a complaint is based on a breach of express or implied contract with additional allegations of a refusal to pay or turn over money, as where defendant holds money or property in a fiduciary capacity, as to whether the cause of action is based on the contract or on the tortious conversion. The general rule seems to be that in such case the action is to be considered as based on the contract[98] and that where there is an ambiguity as to whether the action is on the contract or on the tort, it is to be presumed that it is based on the contract.[99] Where there is doubt as to the form of the complaint the doubt will be resolved against the pleader.[100] An agent employed to sell goods and account for the proceeds, where he sells and refuses to account, may be sued on the contract for refusing to account or for the conversion of the goods,[101] but where the action is based on the failure or refusal to account, the addition of an allegation of conversion generally does not change the cause of action from one on contract to one on tort[102] except where the allegation of conversion is the gist of the action and the contract is set forth merely as matter of inducement.[103] The rule that the action is based on contract rather than on tort

[96] Haynes v. McKee, 18 Misc. 361.

[97] Chambers v. Lewis, 2 Hilt. 591, 595.

[98] Tuers v. Tuers, 100 N. Y. 196, 16 Abb. N. C. 464; Leach v. Smith, 27 App. Div. 290.

[99] Central Gas & Electric Fixture Co. v. Sheridan, 1 Misc. 386, 49 State Rep. 639.

[100] May v. Georger, 21 Misc. 622.

[101] Ridder v. Whitlock, 12 How. Pr. 208.

[102] Ladd v. Arkell, 37 Super. Ct. (5 J. & S.) 35; Greentree v. Rosenstock, 61 N. Y. 583; Harden v. Corbett, 6 Hun, 522; Tugman v. National Steamship Co., 76 N. Y. 207; Rector of Church of Redeemer v. Crawford, 36 Super. Ct. (4 J. & S.) 307, 14 Abb. Pr., N. S., 200; Segelken v. Meyer, 94 N. Y. 473; Tuers v. Tuers, 100 N. Y. 196; Selye v. Zimmer, 40 State Rep. 604; Cohn v. Beckhardt, 63 Hun. 333, 44 State Rep. 544; Leach v. Smith, 27 App. Div. 290.

[103] Ridder v. Whitlock, 12 How. Pr. 208.

applies where the action is against an attorney for failure, on demand, to pay over money received as an attorney,[104] and also where property is deposited for a specific purpose and in an action based on breach of agreement there is also an allegation of unlawful conversion.[105] Likewise the allegation in a complaint for money had and received to plaintiff's use, that defendant fraudulently misappropriated the money, does not convert the action into one of tort for conversion, though an order of arrest is obtained therein.[106]

—— **Action for breach of contract where fraud or negligence is also alleged.** Where the gravamen of an action is breach of contract, the fact that the complaint also contains allegations of fraud, false representations, or negligence does not make the action one ex delicto.[107] But where a complaint

[104] Gopen v. Crawford, 53 How. Pr. 278.

[105] Ganley v. Troy City Nat. Bank, 98 N. Y. 487; Austin v. Rawdon, 44 N. Y. 63, which is said to be distinguishable from the case of Allen v. Allen, 52 Hun, 398, 24 State Rep. 477, which held that a somewhat similar complaint was based on tort in that the former stated a complete cause of action in such form as to entitle plaintiff to recover as on contract a money judgment, and that the allegation of conversion might well be regarded as the statement of a mere conclusion unnecessary to the cause of action and therefore to be properly disregarded by the court in determining the nature of the cause of action. See, also, Thomas Mfg. Co. v. Symonds, 27 App. Div. 316, where complaint is held to state cause of action in tort for conversion.

[106] Stafford v. Azbell, 6 Misc. 89, 55 State Rep. 487.

[107] Bosworth v. Higgins, 54 Hun, 635, 7 N. Y. Supp. 210; Sparman v. Keim, 83 N. Y. 245; Ledwich v. McKim, 53 N. Y. 307; Rothchild v. Grand Trunk Ry. Co., 30 State Rep. 642, 19 Civ. Proc. R. (Browne) 53; Neftel v. Lightstone, 77 N. Y. 96.

The same rule applies where breach is of implied contract. Byxbie v. Wood, 24 N. Y. 607.

Action for debt. Harris v. Todd, 16 Hun, 248.

The true test of a complaint as to whether it is in tort or upon contract, where the damages arise upon a breach of warranty, is the presence in or absence from the pleading of an averment of an intent to cheat, deceive, or defraud; and without this the action is on contract even though representations are charged to have been falsely and knowingly made. Lindsay v. Mulqueen, 26 Hun, 485.

Where a breach of a contract to faithfully serve defendant as superintendent of its work was alleged, together with damage resulting

is based on fraud in procuring a loan from plaintiff in consideration of a promissory note attached to and made part of the complaint, the action is based on tort.[108] The new rule introduced by the amendments of 1879 to section 549 of the Code that in an action on contract, express or implied, other than a promise to marry, where fraud is alleged, plaintiff cannot recover unless he proves the fraud on the trial of the action, and a judgment for defendant is not a bar to a new action to recover upon the contract only,[109] will be treated of in a subsequent chapter.

——**Actions against carriers.** The liability of a common carrier for failure to deliver goods may be enforced, at the option of the pleader, either on the theory of breach of contract or tort,[110] but an action against carriers solely on

therefrom, the additional averment that the act complained of was the willful and negligent certification of false and fraudulent pay rolls, did not change the nature of the cause of action, since the negligence and willfulness was not material thereto. Pecke v. Hydraulic Construction Co., 23 App. Div. 393.

An action brought by a patient in a charity hospital, where, however, she was received for pay, for injuries received in consequence of the negligence of a nurse, was held to be brought upon the contract obligation, and not as for tort. Ward v. St. Vincent's Hospital, 39 App. Div. 624.

[108] Smith v. Smith, 4 App. Div. 227; 74 State Rep. 194. Compare Peck v. Root, 5 Hun, 547.

[109] Rowe v. Patterson, 48 Super. Ct. (16 J. & S.) 249; Hoboken Beef Co. v. Loeffel, 23 Abb. N. C. 93, 22 State Rep. 466, 16 Civ. Proc. R. (Browne) 394.

[110] "If the pleader chose to predicate it upon contract, he would allege a contract, the consideration, and the breach or non-fulfillment of it. If he chose to predicate it upon tort, he would allege the custom of the realm, the loss by conversion, etc. Certain incidents are peculiar to each form of action. In the former was to be observed the same rule as to joinder of parties as in other actions upon contract. In the latter the same rules in that respect applied as to actions for tort. So, too, since the act to abolish imprisonment for debt and the adoption of the Codes, there has been a distinction in the executions issuable in the different forms of action. In the former, execution can only issue against the property. In the latter, it may issue against the person of the party. Whether this action belongs to one or the other of these classes depends upon the form of the summons,

the custom is an action of tort[111] although if plaintiff also relies on an undertaking, general or special, the cause of action is founded on contract.[112] The liability of a carrier for loss by negligence does not arise from any contract, but from negligence of defendant in respect to his trust or agency, so that the cause of action is in the nature of a tort[113] but it was held under the old Code that such an action, though in form a wrong, is founded on contract, where the essential allegations of an action on contract are included in the complaint and where the summons is in the form of an action for money on contract.[114] A passenger's action against a carrier for an assault committed en route by the carrier's servant is founded on tort.[115]

—— **Action for breach of marriage promise.** An action for breach of marriage promise, though in form on contract, is in substance for tort.[116]

—— **Action against inn-keeper.** An action based on the common law liability of an inn-keeper is founded in tort and not in contract.[117]

—— **Action to recover statutory penalty.** It seems that the claim on which an action to recover a statutory penalty is based is not a cause of action arising on contract.[118]

—— **Actions against corporate officers.** An action against the directors of a corporation to charge them individually with a corporate debt is to be regarded as an action on

and especially upon the allegations in the complaint." Catlin v. Adirondack Co., 11 Abb. N. C. 377.

111 Bank of Orange v. Brown, 3 Wend. 158.

112 Bank of Orange v. Brown, 3 Wend. 158; Colwell v. New York & E. R. Co., 9 How. Pr. 311.

113 Atlantic Mut. Ins. Co. v. McLoon, 48 Barb. 27.

114 Campbell v. Perkins, 8 N. Y. (4 Seld.) 430; Catlin v. Adirondack Co., 81 N. Y. 639.

115 Feeney v. Brooklyn City R. Co., 36 Hun, 197; Priest v. Hudson River R. Co., 10 Abb. Pr., N. S., 60, 40 How. Pr. 456, 32 Super. Ct. (2 Sweeny) 595.

116 Thorn v. Knapp, 42 N. Y. 474.

117 People ex rel. Burroughs v. Willett, 15 How. Pr. 210; 6 Abb. Pr. 37, 26 Barb. 78.

118 Abbott v. New York Cent. & H. R. R. Co., Sheld. 278.

119 Durant v. Gardner, 10 Abb. Pr. 445, 19 How. Pr. 94.

contract[119] but the liability of a trustee of a manufacturing corporation for failure to file the annual report of the company is based on tort.[120]

ART. II. PROCEEDINGS WITHOUT PROCESS OR PLEADING.

(A) SUBMISSION OF CONTROVERSY ON ADMITTED FACTS.

§ 8. General considerations.

If persons between whom differences exist, agree as to the facts but disagree as to the law, they may submit their dispute to a court of record on what is called an agreed case which contains a statement of the facts on which the controversy depends. This method of procedure does away with the necessity of summons and pleadings. It is called a "submission of a controversy, on facts admitted," and the rules relating thereto are laid down in the Code in the chapter on judgments and in the subdivision "judgments taken without process."[121] Under the old Code, the proceeding was not an action[122] but the present Code expressly provides that on the filing of the papers, the controversy becomes an action.[123]

An action cannot be submitted, and where there is a submission made after the commencement of an action, it works a discontinuance of the action.[124]

§ 9. Nature of controversy to be submitted.

There must be a real controversy on which an action could be brought, as distinguished from an abstract or mooted question,[125] and where the statement and briefs of both sides are drawn by the same attorney, the court should refuse to act.[126] So a question which has not yet arisen can not be submitted,[127] nor can a question of fact, as distinguished from a question

120 Clapp v. Wright, 21 Hun, 240.

121 Code Civ. Proc. §§ 1279-1281.

122 Lang v. Ropke, 8 Super. Ct. (1 Duer) 701.

123 Code Civ. Proc. § 1280.

124 Van Sickle v. Van Sickle, 8 How. Pr. 265.

125 Clapp v. Guy, 31 App. Div. 535; Bloomfield v. Ketcham, 95 N. Y. 657; Troy Waste Mfg. Co. v. Harrison, 73 Hun, 528.

126 Wood v. Nesbit, 47 State Rep. 34.

127 Trustees of Hobart College v. Fitzhugh, 27 N. Y. 130.

of law.[128] Furthermore, the action must be prosecuted for the benefit of a particular person and hence an action to obtain the construction of a will can not be submitted.[129]

§ 10. Parties.

The submission must be joined in by all persons who would be necessary parties if the action was commenced by summons;[130] and hence if one or more of such persons refuses or is incompetent to join in the submission, the case can not be submitted. Thus, one member of a firm can not submit a case.[131] The Code provides that the parties who may agree on a case and submit it, must be of full age, and hence an infant or his guardian can not submit a controversy.[132] Doubt has been expressed as to whether a trustee may submit a controversy[133] though no good reason appears why he may not do so, especially if he obtains leave of court.

§ 11. Requisites and sufficiency of submission.

The papers to be submitted should include a submission of the controversy containing a stipulation of facts signed by the attorneys of both parties, and the affidavit of one of the parties. The submission must be acknowledged or proved, and certified, in like manner as a deed, to be recorded in the county where it is filed.[134] The agreed facts should be entitled with the name of the court and the names of the parties with the addition of the words "plaintiff" and "defendant." An agreed case containing the facts is absolutely necessary[135] and

[128] Clark v. Wise, 46 N. Y. 612.

[129] Trustees of Hobart College v. Fitzhugh, 27 N. Y. 130.

[130] Dickinson v. Dickey, 76 N. Y. 602; Kelley v. Hogan, 69 App. Div. 251. See, also, Woodruff v. Oswego Starch Factory, 66 App. Div. 617. New parties cannot be brought in without their consent. Trustees of Hobart College v. Fitzhugh, 27 N. Y. 130.

[131] Harrington v. Higham, 13 Barb. 660.

[132] Lathers v. Fish, 4 Lans. 213; Fisher v. Stilson, 9 Abb. Pr. 33; Coughlin v. Fay, 68 Hun, 521.

[133] Waring v. O'Neill, 15 Hun, 105.

[134] Code Civ. Proc. § 1279.

[135] Troy Waste Mfg. Co. v. Harrison, 73 Hun, 528; 56 State Rep. 183.

should stipulate that judgment may be directed and set forth the nature of the judgment sought,[136] and must provide for judgment in case of a decision favorable to defendant as well as for a judgment in plaintiff's favor, in case of a decision favorable to defendant.[137] It can not propound legal interrogatories to the court not decisive of the proper judgment to be rendered on the facts stated.[138] The agreed case, so far as the sufficiency of its presentation of facts is concerned, should be governed by the same rules as those applicable to a pleading.[139] The agreed facts must show a controversy actually existing between the parties of which the court would have jurisdiction if an action was brought for the same cause.[140] All the material facts bearing on the question to be decided should be stated[141] and the facts set forth must be such as will enable the court to render the proper judgment.[142] Admissions contained in the case have all the effect of admissions in pleadings,[143] and an admission involving questions of law

—— Form of statement of facts.

[Title the same as in an ordinary pleading.]

Submission of a controversy, on facts admitted, as provided for by Code Civil Procedure, § 1279. The parties above named hereby agree on the following facts to be submitted to the court to determine the controversy between said parties in regard thereto: [State the facts as in a pleading.]

Plaintiff demands judgment that * * *, with costs.

Defendant demands judgment that * * *, with costs.

[Date.] [Signatures of all the parties.]

[Acknowledgment or proof same as to a deed to be recorded in the county where filed.]

136 Marshall v. Hayward, 67 App. Div. 137; Kelley v. Hogan, 69 App. Div. 251; Williams v. City of Rochester, 2 Lans. 169.

137 Zarkowski v. Schroeder, 60 App. Div. 457.

138 Wood v. Squires, 60 N. Y. 191.

139 Brownell v. Town of Greenwich, 114 N. Y. 518. But there is no reason for greater particularity in admitting facts for the submission of a controversy than in alleging them in a pleading. Id.

140 Kelley v. Hogan, 69 App. Div. 251.

141 Kneller v. Lang, 137 N. Y. 589.

142 Dickinson v. Dickey, 76 N. Y. 602.

143 Chicago & E. I. R. Co. v. Central Trust Co., 41 App. Div. 495.

is binding on the court,[144] though if the admission is improvidently made, it seems the injured party may move to strike out or amend.[145] If the submission does not provide for costs, the awarding thereof is discretionary with the court.[146]

—— **Affidavit.** The case must be accompanied with the affidavit of one of the parties to the effect that the controversy is real and that the submission is made in good faith, for the purpose of determining the rights of the parties.[147] This affidavit can not be made by an attorney of one of the parties unless perhaps where the parties are not natural persons.[148]

—— **Form of affidavit.**

A, being duly sworn, deposes and says that the controversy set forth in the foregoing statement of facts is real, and that the submission is made in good faith, for the purpose of determining the rights of the parties. [Signature.]

[Jurat.]

§ 12. Filing of papers and subsequent proceedings.

The case, submission, and affidavit, must be filed in the office of the clerk of the court to which the submission is made. If the submission is made to the supreme court, such papers must be filed in the office of the county court, if any, specified in the submission; if no county clerk is so specified, they may be filed in the office of any county clerk. Thereafter the controversy becomes an action, so that every provision of law relating to a proceeding in an action applies to the subsequent proceedings therein[149] except that an order of arrest, a temporary injunction, or a warrant of attachment can not be granted in such an action, and that the costs are in the discretion of the court except that costs cannot be taxed for any proceedings before notice of trial.[150]

144 Fearing v. Irwin, 55 N. Y. 486.

145 Fearing v. Irwin, 55 N. Y. 486.

146 Gray v. Daniels, 18 App. Div. 465; Herkimer County Light & Power Co. v. Johnson, 37 App. Div. 257, 264.

147 Code Civ. Proc. § 1279.

148 Bloomfield v. Ketcham, 95 N. Y. 657.

149 Code Civ. Proc. § 1280.

150 Code Civ. Proc. § 1281; Neilson v. Mutual Ins. Co., 10 Super. Ct.

——**Hearing and determination.** The action must be tried by the court, on the agreed case alone.[151] If the action is in the supreme court, it must be tried and judgment rendered by the appellate division thereof, and if in the city court of New York, it must be tried and judgment rendered at the general term thereof.[152] The court has no power to determine anything except that which affects the interest of the parties,[153] and the court can make no inference or in any way depart from, or go beyond, the statement presented,[154] though the court is bound by presumptions necessarily arising from the conceded facts.[155] Statements of fact not embodied in the agreement submitted, though contained in the claim set forth by a party, can not be considered.[156] There can be no "submission of a controversy" under the Code to a trial judge, but something analogous to this practice occurs where, after an action is commenced, it is submitted to the justice on an agreed statement of facts.[157]

——**Dismissal of submission.** If the statement of facts contained in the case is not sufficient to enable the court to render judgment, an order must be made, dismissing the submission without costs to either party, unless the court permits the parties or other representatives to file an additional statement which it may do in its discretion without prejudice

(3 Duer) 683. An additional allowance cannot be granted. People v. Fitchburg R. Co., 133 N. Y. 239.

151 Code Civ. Proc. § 1281.

The submission is an enumerated motion. Rule 38 of the General Rules of Practice.

152 Code Civ. Proc. § 1281; Waring v. O'Neill, 15 Hun, 105. But the special term of the supreme court has entertained an application as a motion where the resisting party was an officer of the court. O'Clair v. Hale, 25 Misc. 31.

153 Union Nat. Bank v. Kupper, 63 N. Y. 617.

154 Missouri, K. & T. Ry. Co. v. Union Trust Co., 156 N. Y. 592; Crosby v. Thedford, 7 Civ. Proc. R. (Browne) 245; Fearing v. Irwin, 55 N. Y. 486; Beer v. Simpson, 47 State Rep. 219, 22 Civ. Proc. R. (Browne) 351, 65 Hun, 17; Tanenbaum v. Simon, 71 App. Div. 611, 75 N. Y. Supp. 922.

155 Hovey v. Chisolm, 56 Hun, 328.

156 Kelly v. Kelly, 72 App. Div. 487.

157 Clearwater v. Decker, 13 Hun, 63.

to the original statement.[158] But an additional statement will not be allowed to be filed where necessary parties are not parties to the submission.[159] A person not a party to the submission can not move to dismiss it as collusive.[160] A reservation in a submission to the effect that none of the admissions therein contained "are in any wise to affect either party, or to be regarded as made except for the purpose of this controversy upon the foregoing statement," will call for a dismissal of the proceedings.[161] So the submission may be dismissed and the decision set aside where it appears that the statement and briefs of both sides were prepared by the same attorney.[162]

§ 13. Judgment.

The judgment should grant such relief, whether legal or equitable, as is proper, but can not grant different relief from that sought in the submission.[163] Nor can relief by injunction be granted on the submission of a controversy.[164] But a specific performance may be decreed.[165] Where the parties have distinctly specified the relief to be awarded in case the court find the question submitted in favor of plaintiff, the court will not, even if it has the power, authorize an amendment, by extending such relief, after determination of the submitted controversy, and enter judgment thereon.[166] The case, submission, affidavit, and a certified copy of the judgment and of any order or paper necessarily affecting the judgment, compose the judgment roll.[167]

[158] Code Civ. Proc. § 1281. The submission will be dismissed where the questions presented arise from inferences rather than facts set out in the statement. Tanenbaum v. Simon, 71 App. Div. 611; 75 N. Y. Supp. 922.

[159] Kelley v. Hogan, 69 App. Div. 251.

[160] Berlin Iron Bridge Co. v. Wagner, 32 State Rep. 119.

[161] Chicago & E. I. R. Co. v. Central Trust Co., 41 App. Div. 495.

[162] Wood v. Nesbit, 47 State Rep. 34.

[163] Kingsland v. City of New York, 42 Hun, 599.

[164] Code Civ. Proc. § 1281; Cunard Steamship Co. v. Voorhis, 104 N. Y. 525; People v. Mutual Endowment & Accident Ass'n of Bath, 92 N. Y. 622.

[165] Associate Alumni v. General Theological Seminary, 153 N. Y. 417.

[166] Kingsland v. City of New York, 42 Hun, 599.

[167] Code Civ. Proc. § 1281.

(B) ARBITRATION.

§ 14. To avoid an action before a court, two or more persons may, by an instrument in writing, duly acknowledged or proved, and certified, in like manner as a deed to be recorded, submit to the arbitration of one or more arbitrators any controversy, existing between them at the time of submission, which might be the subject of an action.[168] A full discussion as to the procedure in arbitration proceedings will be found in a subsequent volume in connection with the procedure in special proceedings.

(C) JUDGMENT BY CONFESSION.

§ 15. The Code provides that a judgment by confession may be entered, without action, either for money due or to become due, or to secure a person against contingent liability in behalf of the defendant, or both.[169] The procedure, as regulated by the Code, will be treated of in the chapter relating to judgments.

ART. III. CHOICE OF REMEDIES.

(A) CUMULATIVE REMEDIES.

§ 16. Definition.

A cumulative remedy is a second or additional mode of procedure in addition to one already available as opposed to alternative remedy.[170]

§ 17. Rule stated.

As a general rule, where there is a right of action or remedy at common law, and a remedy is likewise given in the affirmative by statute without a negative, express or implied, of the common law remedy, the new remedy is cumulative.[171] Thus

168 Code Civ. Proc. § 2366.

169 Code Civ. Proc. § 1273.

170 Cyc. Law Dict. 235.

171 Tremain v. Richardson, 68 N. Y. 617; Smith v. Lockwood, 13 Barb. 209. The addition of a penalty, by statute, for a common-law offense, e. g. a nuisance, is merely cumulative; and any one may

the provisions of the old Code[172] allowing a joint debtor named in the summons, but not served, to be brought in after judgment, were cumulative, and did not preclude a new action.[173] But the rule of construction is settled that when "new rights, duties, or liabilities" are conferred by statute and specific remedies provided therein for their protection, such remedies are exclusive.[174]

§ 18. Civil and criminal remedies.

A civil remedy is not ordinarily superseded by a subsequent statute providing for a criminal remedy.[175]

§ 19. Enforcement of lien and debt.

The right to enforce a lien as given by statute is a cumulative remedy with the right to sue on the claim.[176]

§ 20. Remedies affecting corporations.

A remedy provided for by a general or special statute relating to corporations, or by the charter of a corporation, is only

nevertheless abate the nuisance. Renwick v. Morris, 7 Hill, 575. For further authorities, see 3 Abb. Cyc. Dig. 955.

[172] Code Pro. §§ 375-381.

[173] Lane v. Salter, 51 N. Y. 1; Dean v. Eldridge, 29 How. Pr. 218; Utica Clothes Dryer Mfg. Co. v. Otis, 37 Hun, 301.

[174] Matter of New York, L. E. & W. R. Co., 110 N. Y. 374. It is only where a new right is given, which the party would not be entitled to but for the statute, that the remedy afforded by the statute is exclusive. Jordan & S. Plank Road Co. v. Morley, 23 N. Y. 552. Such rule is not applicable to the corporation tax law. Central Trust Co. v. New York City & N. R. Co., 110 N. Y. 250. The rule, that where a new right or the means of acquiring it is conferred, and an adequate remedy for its invasion given by the same statute, parties injured are confined to the statutory redress, does not apply to the right of the people to inquire into the title to office of a member of a board of aldermen of a city, the charter of which confers on such board the right to judge of the election of its own members. People ex rel. Hatzel v. Hall, 80 N. Y. 117.

[175] Wilkinson v. Gill, 74 N. Y. 63; Code Civ. Proc. § 1899.

[176] So held as to mechanics' liens. Biershenk v. Stokes, 46 State Rep. 179; In re Gould Coupler Co., 79 Hun, 206, 61 State Rep. 164.

cumulative with the former remedy at common law or in equity.[177] Thus quo warranto proceedings are not precluded by the fact that the charter gives another remedy.[178]

§ 21. Enforcement of judgment.

Supplementary proceedings and a judgment creditor's suit are cumulative remedies.[179] So the remedy given an executor or administrator to have execution on a judgment in favor of the deceased, is cumulative with the remedy by suit on the judgment,[180] as are the remedies provided for the enforcement of a surrogate's decree against an administrator and for the enforcement of a judgment in which the decree has been merged by being docketed.[181]

§ 22. Proceedings relating to real property.

Proceedings to compel the determination of claims to real property have been held properly brought and prosecuted by notice under the statutes in regard thereto, notwithstanding the Code provision for a prosecution by action,[182] and no reason is apparent why the rule is not the same under the Code of Civil Procedure.[183]

(B) ELECTION BETWEEN REMEDIES.

§ 23. Definition and nature of doctrine.

Election of remedies is defined as the choice between two or more co-existing and inconsistent remedies for the same wrong.[184] A man may not take contradictory positions, and where he has a right to choose one of two modes of redress, and the two are so inconsistent that the assertion of one in-

177 Kinnan v. Forty-second St., M. & S. N. A. Ry. Co., 140 N. Y. 183; Ogdensburgh, R. & C. R. Co. v. Frost, 21 Barb. 541; Langan v. Francklyn, 29 Abb. N. C. 102.

178 People v. Hillsdale & Chatham Turnpike Road, 23 Wend. 254; People ex rel. McKinch v. Bristol & R. Turnpike Road, 23 Wend. 222.

179 Matter of Bachiller De Ponce De Leon, 69 N. Y. Supp. 242.

180 Freeman v. Dutcher, 15 Abb. N. C. 431.

181 Townsend v. Whitney, 75 N. Y. 425.

182 Barnard v. Simms, 42 Barb. 304.

183 Code Civ. Proc. § 1638.

184 2 Story, Eq. Jur. § 1078.

volves the negation or repudiation of the other, his deliberate and settled choice of one, with knowledge, or the means of knowledge, of such facts as would authorize a resort to each, will preclude him thereafter from going back and electing again.[185] The election does not apply to the form of the action but to the essence of the remedy,[186] though the waiver of a tort by suing as on an implied contract is often spoken of as an election of remedies.[187] The term "election of remedies" is often used as including "election of rights" and even when used in its strict sense the word remedy is used as synonymous with "remedial rights" as that term has been already defined.[188]

The rule does not apply where the two remedies are based on a different state of facts[189] or where plaintiff has but one remedy and has elected to use but one, though he has brought different actions[190] or to prevent one who pleads facts as a set-off from using the facts so pleaded as a bar to the action,[191]

[185] Thompson v. Howard, 31 Mich. 309. The doctrine of election, usually predicated of inconsistent remedies, consists in holding the party, to whom several courses were open for obtaining relief, to his first election, where subsequently he attempts to avail himself of some further and other remedy not consistent with, but contradictory of, his previous attitude and action upon his claim. The basis for the application of the doctrine is in the proposition that where there is, by law or by contract, a choice between two remedies, which proceed upon opposite and irreconcilable claims of right, the one taken must exclude and bar the prosecution of the other. Mills v. Parkhurst, 126 N. Y. 89.

[186] 7 Enc. Pl. & Pr. 362, note.

[187] Keener, Quasi Contracts, 159.

[188] It has been said that the rule that where a person has a right to affirm or disaffirm a contract, and brings an action or takes other steps based on such disaffirmance, he cannot afterwards be heard in a court of justice to assert the contrary, has nothing to do with election of remedies but is based on the doctrine that when a person has made an election as to rights he should not afterwards be permitted to change his position and set up an inconsistent right. Garrison v. Marie, 7 Civ. Proc. R. (Browne) 113, 121.

[189] White v. Whiting, 8 Daly, 23.

[190] Henderson v. Bartlett, 32 App. Div. 435.

[191] Chatfield v. Simonson, 92 N. Y. 209. Another illustration of the unlimited extent to which the doctrine has been sought to be applied.

or to preclude a plaintiff from recovering on a different cause of action introduced by amendment of the complaint.[192]

It is not the purpose of this sub-chapter to state what remedies are available to a particular person on the breach of a particular obligation or duty, or to more than state the general rule as to what remedies are consistent and what are inconsistent.[193]

§ 24. Inconsistency of remedies.

There can be no election of remedies which will preclude resort to another remedy, unless such remedies are inconsistent. Co-existent and alternative remedies may be pursued where they are consistent, as where both are in affirmance of the contract.[194] The difference between inconsistent and consistent remedies is that in the one case the choice itself operates as a bar to the right to resort to other remedies while in the latter there is no bar until a satisfaction of the judgment.[195] If a party to a contract has a right to rescind the contract on the ground of fraud, but instead sues to enforce the contract, he has made an election between "inconsistent" remedies.[196] So an action for conversion is not consistent with a replevin action[197] or an action of assumpsit[198] or an action for dividends on the property alleged to have been converted by defendant.[199] On the other hand, an action for malpractice is con-

[192] Smith v. Savin, 30 Abb. N. C. 192, 69 Hun, 311, 53 State Rep. 378.

[193] For collection of New York cases as to remedies of seller on breach of contract of sale, and election between such remedies, see 11 Abb. Cyc. Dig. 844 et seq.

For notes on election of remedies, see 10 Am. St. Rep. 487, 2 Silv. 291.

Election to hold principal or agent will be considered in a subsequent chapter relating to actions by, against, or between principal and agent.

[194] New York Land Imp. Co. v. Chapman, 118 N. Y. 288.

For examples of remedies held consistent, see Powers v. Benedict, 88 N. Y. 605; Hersey v. Benedict, 15 Hun, 282.

[195] 7 Enc. Pl. & Pr. 363.

[196] Acer v. Hotchkiss, 97 N. Y. 395.

[197] Baumann v. Jefferson, 4 Misc. 147, 53 State Rep. 116.

[198] Emerald & Phoenix Brewing Co. v. Leonard, 22 Misc. 120.

[199] Where a plaintiff has sued a corporation, which refuses to recognize him as one of its stockholders, for damages for conversion

sistent with an action against a third person who caused the injury,[200] as is an action against a surviving partner for a debt and an action against decedent's representative for fraud in connection with such debt,[201] or an action of replevin and an action for damages in obtaining goods by false pretences[202] or an action against a sheriff for an escape of a prisoner in custody under a ca. sa. and the issuance of an execution against the prisoner's property[203] or supplementary proceedings and proceedings on a second execution.[204] A mortgagee of chattels who accepts the surplus arising from an execution sale thereof, claiming under an execution which he had issued on a judgment on the secured debt, cannot afterwards claim under the mortgage,[205] but it has also been held that a sale of mortgaged chattels under execution is not an election of remedies.[206]

§ 25. Acts constituting election.

A threat to institute proceedings[207] or the mere preparation of an affidavit in anticipation of bringing an action[208] or a mere demand not followed up by legal proceedings[209] does not constitute an election, but the commencement of an action, with knowledge of the facts is usually sufficient to constitute

of his alleged shares, he can not sue to recover dividends declared on the shares, since the remedies are inconsistent. Hughes v. Vermont Copper Min. Co., 72 N. Y. 207.

200 Radman v. Haberstro, 17 State Rep. 497.

201 Morgan v. Skidmore, 3 Abb. N. C. 92.

202 Welch v. Seligman, 72 Hun, 138, 55 State Rep. 477.

203 Jackson v. Bartlett, 8 Johns. 281.

204 Supplementary proceedings may be pursued concurrently with proceedings on a second execution, unless the property, acquired by the supplementary proceedings or levied on by virtue of the execution, indisputably belonged to the debtor and was amply sufficient to satisfy the debt, in which case an election between the remedies could be compelled. Smith v. Davis, 63 Hun, 100, 43 State Rep. 504.

205 Butler v. Miller, 1 N. Y. (1 Comst.) 496.

206 Bowdish v. Page, 62 State Rep. 676, 81 Hun, 170.

207 Litchfield v. Irvin, 51 N. Y. 51.

208 Rhinelander v. National City Bank, 36 App. Div. 11.

209 Haas v. Selig, 27 Misc. 504.

an election irrespective of whether the action is prosecuted to judgment.[210]

§ 26. Finality of election.

An election of remedies once made by institution of suit is irrevocable[211] irrespective of whether the party obtains satisfaction by means of the remedy which he has chosen,[212] but not where the election is made in ignorance of the facts[213] or where the party has, in his first action, mistaken his remedy and prosecuted a fruitless action.[214]

——**Effect of discontinuance or amendment.** The court of appeals has held that where the action claimed to constitute an election was commenced with knowledge of the facts, its effect cannot be overcome by a discontinuance.[215] But it has held that an amendment of the complaint may do away with the election.[215a]

(C) PENDENCY OF ANOTHER ACTION.

§ 27. Effect of another pending action.

Before bringing suit, the existence of any other action pending between the proposed litigants, and the effect thereof, should be considered. The common law rule which is not changed by the Codes, is that the pendency of a former suit

210 Terry v. Munger, 121 N. Y. 161; Heidelbach v. National Park Bank, 87 Hun, 117, 67 State Rep. 438.

211 Kinney v. Kiernan, 49 N. Y. 164; Second Nat. Bank of Oswego v. Burt, 93 N. Y. 233; Moller v. Tuska, 87 N. Y. 166; Wile v. Brownstein, 35 Hun, 68.

212 Gross v. Mather, 2 Lans. 283.

213 Rochester Distilling Co. v. Devendorf, 72 Hun, 428, 54 State Rep. 871; Equitable Co-operative Foundry Co. v. Hersee, 103 N. Y. 25. For further authorities, see 5 Abb. Cyc. Dig. 546, 547.

214 McNutt v. Hilkins, 80 Hun, 235, 61 State Rep. 647; Bowery Sav. Bank v. Belt, 66 Hun, 57, 49 State Rep. 487; Bowdish v. Page, 81 Hun, 170, 62 State Rep. 676.

215 Conrow v. Little, 115 N. Y. 387, 394. See, also, Terry v. Munger, 121 N. Y. 161. Contra, Equitable Co-operative Foundry Co. v. Hersee, 33 Hun, 169; Underhill v. Rumsey, 18 State Rep. 717.

See Wright v. Ritterman, 27 Super. Ct. (4 Rob.) 704, 1 Abb. Pr., N. S., 428, which proceeds on the theory that the effect of another action pending may be obviated by its discontinuance.

215a Shaw v. Broadbent, 129 N. Y. 114.

in the same jurisdiction between the same parties and for the same cause of action and relief, is matter pleadable in abatement of the second action. The object of the rule is to prevent vexation.[216] But a pending submission to arbitration is not matter of abatement since revocable by either party at any time before the case is finally submitted to the arbitrators for decision.[217] So the amendment of the complaint by adding new defendants does not entitle the original defendants to raise the objection of another action pending because of the original action.[218]

§ 28. Priority of suits.

Pendency of suit "subsequently" commenced is not ground for abating the former[219] but if both suits be commenced at the same time the one may be pleaded in abatement of the other[220] though where two actions were commenced on the same day but plaintiff in the second suit was not served with summons until after she had commenced her action, there was not a former action pending, it being held in addition that there was not a prior action pending because the summons were served on the same day and the law does not regard fractions of a day.[221]

§ 29. When former action is regarded as pending.

A former action is not regarded as pending so as to be cause of abatement, where the complaint has not been filed or served, since in such a case the identity of the causes of action can not be determined;[222] nor where summons has been served on only one of two defendants not including plaintiff in the subse-

[216] Smith v. Compton, 20 Barb. 262. For notes on the subject of the pendency of another action see 26 Abb. N. C. 218, and 3 Ann. Cas. 215.

[217] Smith v. Compton, 20 Barb. 262.

[218] Hurley v. Second Bldg. Ass'n, 15 Abb. Pr. 206, note.

[219] Nicholl v. Mason, 21 Wend. 339.

[220] Haight v. Holley, 3 Wend. 258.

[221] Middlebrook v. Travis, 68 Hun, 155, 52 State Rep. 231.

[222] Parol evidence is inadmissible to prove the identity of the causes of action. Hoag v. Weston, 10 Civ. Proc. R. (Browne) 92; Curry v. Wiborn, 12 App. Div. 1.

quent action,[223] nor where the complaint is set aside with leave to amend on payment of costs which is not done,[224] nor where judgment has been obtained in the former action,[225] nor where the former action has been dismissed or discontinued[226] even after the commencement of the subsequent action[227] where before notice of trial is served,[228] but a conditional order of dismissal not complied with does not prevent the action from being considered as a pending action.[229] So if the sole plaintiff in the former action dies, the action is still pending unless dismissed or abated by order of court.[230] An appeal has no retroactive effect so as to continue the pendency of the action[231] though the suit is considered pending where there has been a reversal and a remanding order.[232]

§ 30. Former action commenced without authority.

The fact that the former action was commenced without authority does not authorize a second action while the former is pending. The remedy of plaintiff is to discontinue the former action or to move to set aside the unauthorized appearance.[233]

223 Warner v. Warner, 6 Misc. 249, 57 State Rep. 763.

224 Owens v. Loomis, 19 Hun, 606.

225 Prince v. Cujas, 30 Super. Ct. (7 Rob.) 76.

226 Averill v. Patterson, 10 N. Y. (6 Seld.) 500; Crossman v. Universal Rubber Co., 131 N. Y. 636; Lord v. Ostrander, 43 Barb. 337; Hallett v. Hallett, 24 Civ. Proc. R. (Browne) 102. But the order of discontinuance must have been entered. Hyatt v. Ingalls, 124 N. Y. 93. For further authorities, see 1 Abb. Cyc. Dig. 329, 330.

Tearing up the complaint is not a discontinuance. Ralli v. Pearsall, 69 App. Div. 254.

227 Beals v. Cameron, 3 How. Pr. 414; Averill v. Patterson, 10 N. Y. (6 Seld.) 500.

228 Swart v. Borst, 17 How. Pr. 69; Bowker Fertilizer Co. v. Cox, 106 N. Y. 555.

229 Cummins v. Bennett, 8 Paige, 79; Simpson v. Brewster, 9 Paige, 245. See, also, Smith v. White, 7 Hill, 520.

230 Cheney v. Rankin, 27 Misc. 609, 29 Civ. Proc. R. (Kerr) 285.

231 Porter v. Kingsbury, 77 N. Y. 164. But see Haviland v. Wehle, 11 Abb. Pr., N. S., 449, and Peck v. Hotchkiss, 52 How. Pr. 226, which were attachment suits where the contrary seems to be held.

232 Gregory v. Gregory, 33 Super. Ct. (1 J. & S.) 1.

233 Briggs v. Gardner, 60 Hun, 543, 39 State Rep. 681, 21 Civ. Proc.

§ 31. Necessity of identity of cause of action.

In order that the pendency of the one action preclude another, the causes of action must be the same in both suits,[234] it not being sufficient that the property in controversy in the two actions is the same.[235] Thus the pendency of a replevin action does not bar an action for the price since the causes of action are different.[236] So an action to recover damages for breach of contract is not for the same cause of action as one to procure a restitution of money obtained by fraud, so that the pendency of one action bars the prosecution of the other.[237] The causes of action are not the same where the latter action embraces an additional cause of action.[238] The test of identity of causes of action is whether the actions are sustained by the same evidence.[239] Another test is whether a judgment in the first action could be pleaded in bar of the second as a former adjudication.[240]

R. (Browne) 42; Donohue v. Hungerford, 1 App. Div. 528, 73 State Rep. 78.

[234] Morris v. Rexford, 18 N. Y. 552; Dawley v. Brown, 79 N. Y. 390. For further cases, see 1 Abb. Cyc. Dig. 331-333.

Causes of action held not the same: Action on collateral and principal debt, Gambling v. Haight, 59 N. Y. 354; action against corporation trustees for false report and against one for failure to file report, Nimmons v. Tappan, 32 Super. Ct. (2 Sweeny) 652; action for quarterly rent and yearly rent, Kelsey v. Ward, 16 Abb. Pr. 98 (see, also, Blauvelt v. Powell, 59 Hun, 179, 36 State Rep. 323, 20 Civ. Proc. R. [Browne] 186); suits to foreclose junior and prior mortgages, Guilford v. Jacobie, 69 Hun, 420, 52 State Rep. 837; actions to recover damages for preventing earning of commissions and for commissions earned, Flaherty v. Herring-Hall-Marvin Safe Co., 22 Misc. 329; actions for goods sold and for conversion, Wright v. Ritterman, 27 Super. Ct. (4 Rob.) 704, 1 Abb. Pr., N. S., 428.

[235] Dawley v. Brown, 79 N. Y. 390; Mandeville v. Avery, 124 N. Y. 376; Smith v. College of St. Francis Xavier, 46 State Rep. 893, 61 Super. Ct. (29 J. & S.) 363.

[236] Cobb v. Cullen Bros. & Lewis Steel Co., 68 App. Div. 179.

[237] Lawrence v. Freeman, 59 App. Div. 55.

[238] Walker v. Pease, 17 Misc. 415.

[239] Atlanta Hill Gold Min. Co. v. Andrews, 55 Super. Ct. (23 J. & S.) 93, 8 State Rep. 157; Johnson v. Smith, 8 Johns. 299.

[240] Newell v. Newton, 10 Pick. (Mass.) 470.

§ 32. Identity of relief sought.

If the causes of action are the same, the fact that in the second action additional relief is asked will not authorize its maintenance[241] nor will the fact that collateral matters are involved in the second action which might have been introduced into the first by amendment.[242]

§ 33. Cumulative remedies.

The pendency of another action is not a defense where the two remedies are cumulative. Thus an action for services does not preclude an action to foreclose a mechanic's lien,[243] and vice versa.[244]

§ 34. Action on debt and to foreclose mortgage.

The right to sue on a debt secured by mortgage, pending a suit to foreclose the mortgage, depends on leave of court.[245] The matter will be fully treated of in the chapter relating to foreclosure of real estate mortgages.

§ 35. Pendency of another action for part of demand.

Where one splits his cause of action, which is entire, and brings two actions, the pendency of the first action is a defense to the second action.[246]

§ 36. Necessity of identity of parties.

The parties to the actions, in order that the pendency of the former action be a defense, must be the same or persons in

[241] Ward v. Gore, 37 How. Pr. 119; Ogden v. Bodle, 9 Super. Ct. (2 Duer) 611.

[242] Dickinson v. Codwise, 4 Edw. Ch. 341. Compare Bartholomay Brewing Co. v. Haley, 16 App. Div. 485.

[243] Raven v. Smith, 71 Hun, 197. Compare Matter of Gould Coupler Co., 79 Hun, 206; Smith v. Fleischman, 23 App. Div. 355, 358; Gambling v. Haight, 59 N. Y. 354.

[244] Hall v. Bennett, 48 Super. Ct. (16 J. & S.) 302.

[245] Code Civ. Proc. § 1628.

[246] Bendernagle v. Cocks, 19 Wend. 207; Smith v. Dittenhoefer, 1 City Ct. R. 143; O'Beirne v. Lloyd, 6 Abb. Pr., N. S., 387, 31 Super. Ct. (1 Sweeny) 19.

privity with the parties to the other action;[247] and where necessary parties are not brought in, defendant may bring a cross-suit bringing in parties necessary to allow him to obtain affirmative relief.[248] So the pendency of a suit against one debtor is no defense to an action against another.[249] And an action pending in a United States court against parties on a joint liability and begun by service of summons on one of defendants alone, is not, before judgment entered or attachment levied, a bar to an action in the state court, on the same cause of action, brought by service of summons on the other defendant alone; and it is immaterial that the former action was commenced in the same state court and removed to the federal court.[250]

§ 37. Necessity that relief sought be obtainable in former action.

The pendency of another action is not an obstacle where the relief sought in the latter action could not have been obtained in the former action,[251] and hence the pendency of an action in which one defendant demands affirmative relief from the other in regard to a controversy which does not arise out of plaintiff's cause of action, cannot be pleaded in abatement to an action brought by defendant as plaintiff against the defendant so answering.[252] And notwithstanding the abolition of the distinction between actions at law and suits in equity, the pendency of a legal cause of action does not ordinarily affect the right to bring suit on an equitable cause of action, and this right can not be taken away by an amendment of the com-

[247] O'Brien v. Browning, 49 How. Pr. 109; Hamilton v. Faber, 33 Misc. 64; Steele v. Connecticut General Life Ins. Co., 31 App. Div. 389. For further authorities, see 1 Abb. Cyc. Dig. 336, 337. Contractors and subcontractors as different parties, see Westervelt v. Levy, 9 Super. Ct. (2 Duer) 354; Egan v. Laemmle, 5 Misc. 224.

[248] Auburn City Bank v. Leonard, 20 How. Pr. 193.

[249] Gridley v. Rowland, 1 E. D. Smith, 670.

[250] Utica Clothes Dryer Mfg. Co. v. Otis, 37 Hun, 301.

[251] Adams v. McPartlin, 11 Abb. N. C. 369; Parker v. Selye, 3 App. Div. 149, 73 State Rep. 353, 3 Ann. Cas. 210; Boyd v. Boyd, 26 Misc. 679; Matter of Hood, 27 Hun, 579 (case in surrogate's court).

[252] Fink v. Allen, 36 Super. Ct. (4 J. & S.) 350.

plaint in the first action after the commencement of the second, so as to change the cause of action to an equitable one.[253]

§ 38. Pendency of another action as affecting counterclaim.

The pendency of another action is a ground of demurrer to a counterclaim which demands an affirmative judgment,[254] but not where no affirmative judgment is demanded.[255]

§ 39. Pendency of another action in which claim might be set up as a counterclaim.

A second action is not defeated by the fact that the cause of action might have been set up as a counterclaim in a former action which is pending,[256] though the rule is otherwise where defendant is bound to set up his counterclaim;[257] and hence pendency of an action for damages is no bar to the setting up of the same demand for damages as counterclaim in a suit afterwards brought against the plaintiffs in the first action by the defendants therein.[258]

§ 40. Action in foreign jurisdiction.

The pendency of another action in a sister state[259] or in a United States court,[260] notwithstanding property has been at-

253 Consolidated Fruit Jar Co. v. Wisner, 38 App. Div. 369.

254 Code Civ. Proc. § 495, subd. 3; Ansorge v. Kaiser, 22 Abb. N. C. 305; Dolbeer v. Stout, 42 State Rep. 693.

255 Fuller v. Read, 15 How. Pr. 236; Copley Iron Co. v. Pope, 13 Daly, 144.

256 Brown v. Gallaudet, 80 N. Y. 413; Lignot v. Redding, 4 E. D. Smith, 285; Collyer v. Collins, 17 Abb. Pr. 467; Notara v. De Kamalaris, 22 Misc. 337.

257 This rule is applicable to cases before justices of the peace before the Code (Lord v. Ostrander, 43 Barb. 337) but not after (Welch v. Hazelton, 14 How. Pr. 97).

258 Wiltsie v. Northam, 16 Super. Ct. (3 Bosw.) 162; Fuller v. Read, 15 How. Pr. 236.

259 Hadden v. St. Louis, I. M. & S. R. Co., 57 How. Pr. 390; Reed v. Chilson, 40 State Rep. 960; Douglass v. Phenix Ins. Co. of Brooklyn, 138 N. Y. 218; Smith v. Crocker, 14 App. Div. 245.

260 Walsh v. Durkin, 12 Johns. 99; Mitchell v. Bunch, 2 Paige, 606; Oneida County Bank v. Bonney, 101 N. Y. 173; Lorillard Fire Ins.

tached in the foreign jurisdiction,[261] is not a defense though a foreign attachment "by a third person" is matter of abatement[262] since in such case defendant may be subjected to a double payment, as is an attachment suit prosecuted to judgment where the attached property has been applied to the payment of the judgment.[263]

§ 41. Method of raising defense.

Questions relating to pleading the pendency of another action,[264] or a stay of proceedings because thereof will be treated of in subsequent chapters.

ART. IV. CAUSE OF ACTION.

(A) DEFINITION.

§ 42. Cause of action defined.

The term "cause of action" is defined by Pomeroy as the primary rights possessed by plaintiff and the corresponding primary duty devolving on defendant, together with the delict or wrong.[265] Other authorities hold that the cause of action is the act or delict on the part of defendant which gives the plaintiff a cause of complaint.[266] The term is often used in a loose sense but as will be more fully noticed hereafter, it is highly important to keep in mind the definition of what is a cause of action inasmuch as the term is often used in the Code provisions in such a way as to require a construction of its meaning.

Co. v. Meshural, 30 Super. Ct. (7 Rob.) 308; Checkley v. Providence & S. Steamship Co., 60 How. Pr. 510.

261 Sargent v. Sargent Granite Co., 31 Abb. N. C. 131, 6 Misc. 384, 56 State Rep. 335; Osgood v. Maguire, 61 Barb. 54.

262 Embree v. Hanna, 5 Johns. 101; Dealing v. New York, N. H. & H. R. Co., 8 State Rep. 386. But see Williams v. Ingersoll, 89 N. Y. 508, where the contrary was held where the parties had all removed to New York.

263 Donovan v. Hunt, 7 Abb. Pr. 29.

264 See post, §§ 865, 866.

265 Pom. Code Rem. (3d Ed.) p. 513; Veeder v. Baker, 83 N. Y. 156.

266 1 Enc. Pl. & Pr. 117.

——**As distinguished from object of action.** The cause of action should not be confused with the object of the action which means its final result.[267]

——**As distinguished from subject of action.** It is sometimes difficult to determine what is the "subject of an action." The term is often used as synonymous with "cause of action." It has been said that the subject of the action relates to the nature of the action or the thing sought to be obtained by the judgment to be given.[268] Pomeroy says that the "subject of an action" is not the "cause of action," nor the "object of the action," but it rather describes the physical facts and hence real and personal, money, lands, chattels, and the like, in relation to which the subject is prosecuted.[268a]

(B) SPLITTING CAUSE OF ACTION.

§ 43. General rule.

The rule is that a single or entire cause of action arising either from a breach of a contract or a tort cannot be subdivided into several claims and separate actions maintained thereon. But a person having two independent causes of action against the same person need not unite them in one action.[269] The reason for this rule is founded on the maxims that "it concerns the commonwealth that there be a limit to litigation" and that "no one should be twice harassed for the same cause." The rule is, however, largely one of mere convenience[270] and need not be enforced in equity where the case does not require it.[271] So the parties may, by voluntary agreement, split up a single cause of action;[272] and the rule may be waived by an agreement by the debtor that, if the creditor will forbear suing upon the whole demand, and will sue upon a part of it, then, in case he recovers, defendant will

267 Pom. Code Rem. (3d Ed.) p. 512.
268 Ready v. Stewart, 1 Code R., N. S., 297.
268a Pom. Code Rem. (3d Ed.) p. 535.
269 Gedney v. Gedney, 19 App. Div. 407; Staples v. Goodrich, 21 Barb. 317.
270 Perry v. Dickerson, 7 Abb. N. C. 465.
271 O'Dougherty v. Remington Paper Co., 81 N. Y. 496.
272 Reilly v. Sicilian Asphalt Paving Co., 170 N. Y. 40.

pay the balance of the claim.[273] The difficulty is to determine what is a single cause of action. The Code does not define the term.

§ 44. Cause of action based on contract.

Claims arising under a contract, which are due, constitute an entire and indivisible cause of action[274] but claims not due may be thereafter sued on.[275] Thus a cause of action for services rendered can not be split where it arises from a single contract, though a judgment in an action to recover damages for a breach of contract of employment by a wrongful dismissal before the expiration of the stipulated term of employment is not a bar to a subsequent action to recover the wages earned during the time of actual employment under the contract, since in such a case there are two causes of action.[276] So a running account, the whole of which was due when suit on a part of it was brought, is an entire demand within the rule that a recovery for a part of an entire demand bars suit for the residue.[277] So if a note is assigned in part to several persons, one of such assignees cannot sue thereon to recover his share of the sum due thereunder.[278] And if a recovery of simple interest has been had, a subsequent suit can not be brought for compound interest.[279] Likewise, a claim for board cannot be split so to allow of a recovery for the raw materials comprised in the board and another recovery for services in preparing

[273] Mills v. Garrison, 3 Abb. App. Dec. 297.

[274] O'Beirne v. Lloyd, 43 N. Y. 248; Samuel v. Fidelity & Casualty Co., 76 Hun, 308.

For example of agreement held not entire, see Skinner v. Walter A. Wood Mowing & Reaping Mach. Co., 140 N. Y. 217.

As to what is a divisible contract, see Hammon on Contracts, p. 907.

[275] Van Keuren v. Miller, 78 Hun, 173; Turner v. Hadden, 62 Barb. 480; Johnson v. Meeker, 96 N. Y. 93.

[276] Perry v. Dickerson, 85 N. Y. 345. But compare O'Brien v. City of New York, 28 Hun, 250.

[277] Secor v. Sturgis, 16 N. Y. 548; Guernsey v. Carver, 8 Wend. 492; Stevens v. Lockwood, 13 Wend. 644.

[278] King v. King, 73 App. Div. 547. Compare Chambers v. Lancaster, 160 N. Y. 342.

[279] Price v. Holman, 135 N. Y. 124.

the food.[280] So all breaches of covenants contained in the same instrument must ordinarily be sued for together; and the question whether successive actions may be brought for breach of a covenant depends on whether the covenant is a continuing one.[281] But a recovery of judgment for goods sold at one time on a credit is no bar to an action for goods sold at another time for cash, since in such a case there are two causes of action.[282]

The rule as to successive actions for installments is that each default in the payment of money falling due upon a contract, payable in installments, may be the subject of an independent action, provided it is brought before the next installment becomes due, but each action should include every installment due when it is commenced, unless a suit is at the time pending for the recovery thereof.[283] This rule applies to actions to recover installments of rent.[284] But it is only in cases where the class of proof is the same for all the causes of action that the rule that a recovery for one installment upon a contract is a bar to all that were due at the time of the commencement of the action, applies.[285]

§ 45. Cause of action founded on tort.

A cause of action founded on a tort cannot be split, but whether a cause of action based on a tort is entire or divisible is a question oftentimes hard to solve because of the continuing nature of some torts. Ordinarily successive actions for a trespass consisting of a single act which is in no wise continued can not be brought.[286] So fraud ordinarily constitutes but one cause of action, though separate and distinct frauds may give

[280] Bowers v. Smith, 54 Hun, 639, 8 N. Y. Supp. 226.

[281] Beach v. Crain, 2 N. Y. (2 Comst.) 86; Fish v. Folley, 6 Hill, 54.

[282] Staples v. Goodrich, 21 Barb. 317.

[283] This rule is not applicable, however, where there has been an adjudication in a prior action between the same parties on the same contract to the effect that the contract is divisible in respect to the several installments. Lorillard v. Clyde, 122 N. Y. 41.

[284] Jex v. Jacob, 19 Hun, 105; Underhill v. Collins, 60 Hun, 585, 39 State Rep. 795; Holthausen v. Kells, 18 App. Div. 80.

[285] Miller v. Union Switch & Signal Co., 37 State Rep. 110.

[286] Draper v. Stouvenel, 38 N. Y. 219; Porter v. Cobb, 22 Hun, 278.

separate actions.[287] So separate actions can not be brought to recover chattels converted at the same time by the same person.[288] Likewise, a cause of action for personal injuries can not be split[289] but separate actions may be brought for an injury to the person and for an injury to property though resulting from the same tortious act, since the court of appeals, in a recent case,[290] has held that there are two separate causes of action.

(C) JOINDER OF CAUSES OF ACTION.

§ 46. Common law rule.

At common law, counts in different forms of action could not be joined nor could counts requiring different pleas and judgments.[291] Thus counts in assumpsit and covenant[292] or assumpsit and trover[293] or trespass and trover[294] could not be joined, nor could counts ex delicto be joined in the same declaration with counts ex contractu.[295] Liabilities in different capacities could not be enforced in the same action.

§ 47. Rule in equity.

A more liberal rule prevailed in equity where it was held

[287] Lee v. Kendall, 56 Hun, 610.

[288] Draper v. Stouvenel, 38 N. Y. 219. Compare Corn Exch. Nat. Bank v. Blye, 56 Hun, 403.

[289] Mitchell v. Metropolitan El. Ry. Co., 134 N. Y. 11; Filer v. New York Cent. R. Co., 49 N. Y. 42. A person who has sued for and recovered damages for personal injuries can recover in a second action for a subsequent and distinct injury for only such additional injuries as may be properly and legally attributed to the second accident, and in so far as the old injuries were increased or aggravated by the second accident there may be a recovery therefor. Brooks v. Rochester Ry. Co., 156 N. Y. 244.

[290] Reilly v. Sicilian Asphalt Paving Co., 170 N. Y. 40.

[291] Wilson v. Marsh, 1 Johns. 503. Counts requiring different pleas were, however, held properly joined in Union Cotton Manufactory v. Lobdell, 13 Johns. 462.

[292] Pell v. Lovett, 19 Wend. 546.

[293] Howe v. Cooke, 21 Wend. 29.

[294] Cooper v. Bissell, 16 Johns. 146.

[295] Church v. Mumford, 11 Johns. 479; Howe v. Cooke, 21 Wend. 29.

that causes of action affecting all the parties could be joined, and a complete determination of the matters in controversy be had in one suit to prevent a multiplicity of suits between the same parties or those in privity with them. Multifariousness, as the term was used in equity, occurred where disconnected matters were joined in a bill against several, part of whom had no interest in or connection with some of the matters; not a mere misjoinder of different causes of action between the same parties.[296] The doctrine of multifariousness has been to a large extent preserved by the Codes.

§ 48. The statute.

The Code of Civil Procedure provides as follows:[297] "The plaintiff may unite in the same complaint two or more causes of action, whether they are such as were formerly denominated legal or equitable, or both, where they are brought to recover as follows:

1. Upon contract, express or implied.
2. For personal injuries [except libel, slander, criminal conversation, or seduction].
3. [For libel or slander].
4. For injuries to real property.
5. Real property, in ejectment, with or without damages for the withholding thereof.
6. For injuries to personal property.
7. Chattels, with or without damages for the taking or detention thereof.
8. Upon claims against a trustee, by virtue of a contract, or by operation of law.
9. Upon claims arising out of the same transaction or transactions connected with the same subject of action, and not included within one of the foregoing subdivisions of this section.
10. [For penalties incurred under the fisheries, game and forest law.]

But it must appear upon the face of the complaint that all

[296] Varick v. Smith, 5 Paige, 137.
[297] Code Civ. Proc. § 484.

the causes of action so united belonged to one of the foregoing subdivisions of this section; [that they are consistent with each other;] and [except as otherwise prescribed by law] that they affect all the parties to the action; and it must appear on the face of the complaint that they do not require different places of trial."[298] It should be constantly kept in mind, in considering subdivisions 1 to 10 inclusive, that they are all modified and controlled by the concluding paragraph of the section.

——**Statute is permissive and not mandatory.** It will be observed that the word "may" is used in connection with the provision in regard to uniting two or more causes of action, so that this Code provision has no application where the question is whether causes of action or claims alleged to constitute causes of action can be split into two or more separate actions.[299]

§§ 49, 50. Whether one or more causes of action are stated.

Before further considering what causes of action may be joined as provided for by the Code, the preliminary question arises as to whether there is actually more than one cause of action stated in the complaint. This question is not free from difficulty, and although it has come before the courts of New York time after time, no general rule seems to have been laid down to determine whether one or more causes of action are stated.[300] The following rule is laid down by Pomeroy[301] as an unerring test in determining whether different causes of action have been joined in a pleading, or whether one alone has been stated, viz: "If the facts alleged show one primary right of the plaintiff and one wrong done by the defendant which involves that right, the plaintiff has stated but a single

[298] The matter in brackets was not in the Code of Procedure. Instead of the bracketed phrase, "except as otherwise provided by law," the old Code read "except in actions for the foreclosure of mortgages." "Injuries to character" took the place of "libel and slander" in subd. 3. Subdivision 10 was introduced by Laws 1900.

[299] Bruce v. Kelly, 5 Hun, 229.

[300] For collection of cases, see 8 Abb. Cyc. Dig. 399-408.

[301] Pom. Code Rem. (3d Ed.) §§ 455, 456.

cause of action, no matter how many forms and kinds of relief he may claim that he is entitled to and may ask to recover * * * If the facts alleged in the pleading show that the plaintiff is possessed of two or more distinct and separate primary rights, each of which has been invaded, or that the defendant has committed two or more distinct and separate wrongs, it follows inevitably from the foregoing principle that the plaintiff has united two or more causes of action, although the remedial rights arising from each, and the corresponding relief may be exactly of the same kind and nature."

—— **Asking for incidental relief.** A complaint which asks for incidental relief, such as an accounting,[302] or damages[303] in connection with an injunction[304] or demand of specific performance of a covenant,[305] or a judgment on an instrument sought to be reformed,[306] or the cancellation of a certificate in addition to delivery of bond [307] or the removal of a cloud from title, in addition to a partition,[308] states but one cause of action.

—— **Demand of multiplicity of relief.** Demanding a multiplicity of relief does not make the complaint bad for stating more than one cause of action, since the cause of action and the relief, as heretofore seen, are separate and distinct matters.[309] Thus conveyances made to different grantees

[302] Garner v. Wright, 28 How. Pr. 92.

[303] Shepard v. Manhattan Ry. Co., 57 Super. Ct. (25 J. & S.) 5, 24 State Rep. 185; McKesson v. Russian Co., 27 Misc. 96; Poole v. Winton, 41 State Rep. 436.

[304] Woodworth v. Brooklyn El. R. Co., 29 App. Div. 1.

[305] Witherbee v. Meyer, 84 Hun, 146, 65 State Rep. 806.

[306] Jeroliman v. Cohen, 8 Super. Ct. (1 Duer) 629; Gooding v. McAlister, 9 How. Pr. 123; Bidwell v. Astor Mut. Ins. Co., 16 N. Y. 263; New York Ice Co. v. Northwestern Ins. Co. of Oswego, 23 N. Y. 357; Pope v. Kelly, 24 Misc. 508.

[307] Turner v. Conant, 18 Abb. N. C. 160.

[308] Henderson v. Henderson, 44 Hun, 420, 9 State Rep. 356.

[309] Geery v. New York & L. Steamship Co., 12 Abb. Pr. 268; Hammond v. Cockle, 2 Hun, 495, 5 Thomp. & C. 56; Bliss v. Winters, 38 App. Div. 174.

Bill to quiet title. Lewis v. Howe, 64 App. Div. 44.

Taxpayer's complaint seeking two-fold relief. Barnes v. Maguire, 33 Misc. 438; Robinson v. Brown, 166 N. Y. 159.

Actions relating to liens. Johnson v. Golder, 132 N. Y. 116; Wood

in pursuance of a common design to defraud the creditors of the grantor may be attacked by a judgment creditor in a single action, since the cause of action upon which the whole fabric of the right of recovery rests is the fraudulent intent or scheme of the grantor to dispose of his property with intent to hinder, delay and defraud creditors, and although there may be divers conveyances in perfecting this scheme, still the whole foundation of the action is the scheme itself, and hence there is but one cause of action.[310] So a claim against a devisee

v. Harper, 85 Hun, 457, 66 State Rep. 160; Helck v. Reinheimer, 23 Wkly. Dig. 473; Ridgway v. Bacon, 72 Hun, 211, 55 State Rep. 345, As where it is also sought to set aside fraudulent conveyance. Tisdale v. Moore, 8 Hun, 19.

Actions relating to pledges. Cahoon v. Bank of Utica, 7 N. Y. (3 Seld.) 486.

Action for specific performance. Spier v. Robinson, 9 How. Pr. 325; Taylor v. Blue Ridge Marble Co., 83 Hun, 30, 64 State Rep. 128; Barlow v. Scott, 24 N. Y. 40.

Partnership actions. Ketchum v. Lewis, 46 State Rep. 843. But see Blanchard v. Jefferson, 28 Abb. N. C. 236, 43 State Rep. 799.

Action for conversion with demand for delivery and damages. Vogel v. Badcock, 1 Abb. Pr. 176.

Action for injury to property and person through defendant's negligence. Howe v. Peckham, 10 Barb. 656, which is criticised in Pom. Code Rem. (3d Ed.) p. 521, note 5, and see Lamming v. Galusha, 135 N. Y. 239, and Rosenberg v. Staten Island Ry. Co., 14 N. Y. Supp. 476, where it is assumed that there are two causes of action.

Statement of separate items of damages. Paret v. New York El. R. Co., 46 State Rep. 29.

Action to cancel deed and recover land. Lattin v. McCarty, 41 N. Y. 107, and for partition. Hammond v. Cockle, 2 Hun, 495.

Action for possession of land and damages for withholding. People v. City of New York, 28 Barb. 240, 8 Abb. Pr. 7, 17 How. Pr. 56.

Action in ejectment particularizing damages. Frazier v. Dewey, 1 App. Div. 138, 73 State Rep. 514.

Actions relating to estates of deceased persons. Fernandez v. Fernandez, 15 App. Div. 469, 78 State Rep. 499. Where an accounting and other additional relief are prayed. Day v. Stone, 15 Abb. Pr., N. S., 137, 5 Daly, 353; Leary v. Melcher, 38 State Rep. 774. Or where removal of a testamentary trustee and an accounting is sought. Elias v. Schweyer, 27 App. Div. 69; Chatterton v. Chatterton, 32 App. Div. 633, 53 N. Y. Supp. 329.

[310] Marx v. Tailer, 12 Civ. Proc. R. (Browne) 226; Morton v. Weil, 33 Barb. 30. See, also, Mahler v. Schmidt, 43 Hun, 512, where per-

and mortgagee for partition may be united with a claim to have the will set aside and the mortgage declared void, since there is but one cause of action under section 1537 of the Code which provides that an heir claiming possession of real property, may sue for partition though not in possession and though the property has been devised to another who is in possession, but the heir must allege and establish that the apparent devise is void.[311]

—— **Separate grounds of liability.** A complaint which sets forth several grounds on which defendant may be liable in respect to the same transaction is not deemed to unite several causes of action.[312]

—— **Effect of allegations constituting surplusage.** There is but one cause of action where the additional charge or claim is surplusage, as where a charge of conspiracy is made in an action of ejectment,[313] or where allegations of fraud are made in an action where the whole claim for relief depends on the alleged infringement of a trade mark.[314]

—— **Identity of amounts claimed under different counts.** A single cause of action can not be inferred from two counts merely because the amounts claimed are precisely the same and the demand of judgment is but for the one sum.[315]

—— **One cause of action where other causes stated are insufficient.** There must be a statement of two or more "per-

sons claiming liens were joined and decision is based on causes of action affecting all the parties.

311 Best v. Zeh, 63 State Rep. 549.

312 Walters v. Continental Ins. Co., 5 Hun, 343; Durant v. Gardner, 10 Abb. Pr. 445, 19 How. Pr. 94; Richards v. Kinsley, 12 State Rep. 125, 14 Daly, 334, 14 State Rep. 701, 27 Wkly. Dig. 372; Sterne v. Herman, 11 Abb. Pr., N. S., 376.

Actions on judgments. Teel v. Yost, 56 Super. Ct. (24 J. & S.) 456; Krower v. Reynolds, 99 N. Y. 245.

Separate statements of fraud do not make separate causes of action (Price v. Price, 2 Hun, 611, 5 Thomp. & C. 696; People v. Tweed, 63 N. Y. 194), in actions to set aside fraudulent conveyances (Reed v. Stryker, 12 Abb. Pr. 47; Royer Wheel Co. v. Fielding, 31 Hun, 274).

313 Horton v. Equitable Life Assur. Soc. of U. S., 35 Misc. 495.

314 Prince Mfg. Co. v. Prince's Metallic Paint Co., 20 N. Y. Supp. 462.

315 Carney v. Bernheimer, 3 Month. Law Bul. 22.

fect" causes of action to warrant the raising of the objection of a misjoinder.[316]

—— **Allegations relating to damages.** Allegations in a complaint merely in aggravation of damages do not ordinarily constitute a separate cause of action,[317] nor do allegations setting forth separate items of damages.[318]

—— **Effect of title of case.** Entitling a cause of action in the name of the plaintiff individually and in a representative capacity does not necessarily require a holding that two causes of action are stated.[319]

§ 51. Legal and equitable causes of action.

Legal and equitable causes of action may be joined[320] when both arise from the same transaction,[321] but the Code provision is not mandatory[322] and the joinder does not preclude the right to a trial by jury.[323]

§ 52. Causes of action which may be joined as enumerated in the Code.

The Code provision authorizing a joinder, already set forth, is clear as to most of its clauses but considerable difference of opinion has existed as to the meaning of other clauses. The subdivisions will now be taken up in the order enumerated in the Code.

—— **(1) Causes of action on contract, express or implied.** Causes of action on contract, express or implied, may

316 Logan v. Moore, 27 Civ. Proc. R. (Kerr) 241; Krower v. Reynolds, 99 N. Y. 245.

317 Gilbert v. Pritchard, 41 Hun, 46.

318 Whitner v. Perhacs, 25 Abb. N. C. 130; Frazier v. Dewey, 1 App. Div. 138, 73 State Rep. 514.

319 Moss v. Cohen, 158 N. Y. 240.

320 Code Civ. Proc. § 484; Lattin v. McCarty, 41 N. Y. 107.

321 New York Ice Co. v. Northwestern Ins. Co. of Oswego, 23 N. Y 357; Bradley v. Aldrich, 40 N. Y. 504. For example, demands for damages for obstructing plaintiff's way, and that defendants be compelled to open the way. Getty v. Hudson River R. Co., 6 How. Pr. 269, 10 N. Y. Leg. Obs. 85.

322 Bruce v. Kelly, 5 Hun, 229.

323 Van Deventer v. Van Deventer, 32 App. Div. 578.

be joined,[324] and a judgment is a contract, within this rule,[325] but a suit to foreclose a mortgage is not brought to recover on contract.[326] Thus, a cause of action on contract against the surviving partner of a firm may be joined with one against him as an individual.[327] Whether a cause of action is based on contract or on tort, has been considered in a preceding subdivision.[328] The cause of action is based on an implied contract where a tort has been waived and the suit brought on an implied promise,[329] but it must be clearly shown in the complaint that the cause of action is based on the implied promise rather than on the tort.[330]

—— **(2) Causes of action for personal injuries.** Causes of action for personal injuries, except libel, slander, criminal conversation, or seduction, may be joined.[331] The rule under the Code of Procedure included all causes of action for personal injuries.[332] Thus under the old Code malicious prosecution and slander were properly joined,[333] but under the present Code, a cause of action for libel or slander cannot be united with other causes of action for personal injuries,[334] such as false imprisonment, though originating at the same time.[335] A cause of action for malicious prosecution may

324 Code Civ. Proc. § 484, subd. 1; Zrskowski v. Mach, 15 Misc. 234; Freer v. Denton, 61 N. Y. 492. Plaintiff may unite a cause of action against defendant as a devisee, charged with payment of a debt of testator, with one arising on contract between plaintiff and defendant. Gridley v. Gridley, 24 N. Y. 130.

325 Barnes v. Smith, 16 Abb. Pr. 420, 24 Super. Ct. (1 Rob.) 699.

326 Selkirk v. Wood, 9 Civ. Proc. R. (Browne) 141.

327 Kent v. Crouse, 5 State Rep. 141; Smith v. Ferguson, 33 App. Div. 561; Nehrboss v. Bliss, 88 N. Y. 600.

328 See ante, § 7.

329 Hawk v. Thorn, 54 Barb. 164; Freer v. Denton, 61 N. Y. 492; Adams v. Bissell, 28 Barb. 382.

330 Booth v. Farmers' & Mechanics' Bank, 1 Thomp. & C. 45.

331 Code Civ. Proc. § 484, subd. 2. What are actions for personal injuries, see Id. § 3343, subd. 12.

332 Code Pro. § 167, subd. 2.

333 Watson v. Hazzard, 3 Code R. 218; Martin v. Mattison, 8 Abb Pr. 3.

334 Anderson v. Hill, 53 Barb. 238; Perrotean v. Johnson, 4 Month. Law Bul. 25, 26.

335 De Wolfe v. Abraham, 151 N. Y. 186.

be united with a cause of action for false imprisonment, since both are for personal injuries.[336] A cause of action for personal injuries cannot, however, be united with a cause of action for a statutory penalty.[337]

—— **(3) Causes of action for libel or slander.** Subdivision 3 authorizes the joinder of causes of action for libel or slander. This subdivision seems so plain that "he who runs may read" and no decisions in regard thereto are to be found.

—— **(4) Causes of action for injuries to real property.** Subdivision 4 authorizes the joinder of causes of action for injuries to real property, and therefore causes of action for trespasses, though committed at different times, may be joined,[338] but a cause of action for injuries to land cannot be united with a cause of action in ejectment[339] or for slander of title[340] or a cause of action based on an implied contract.[341]

—— **(5) Causes of action to recover real property.** Causes of action to recover real property, in ejectment, with or without damages for the withholding thereof, may be joined,[342] but the provision is not mandatory.[343]

—— **(6) Causes of action for injuries to personal property.** Causes of action for injury to personal property may be joined[344] but not with a cause of action for injury to real property.[345] Thus causes of action for deceit may be joined,[346] as may a cause of action for conversion of personal property and one for false and fraudulent representations, inducing plaintiff to execute a bond and a mortgage on his real

[336] Haight v. Webster, 18 Wkly. Dig. 108; Marks v. Townsend, 97 N. Y. 590; Thorp v. Carvalho, 14 Misc. 554, 70 State Rep. 760.

[337] Sullivan v. New York, N. H. & H. R. Co., 1 Civ. Proc. R. (McCarty) 285.

[338] Whatling v. Nash, 41 Hun, 579, 5 State Rep. 189.

[339] Hotchkiss v. Auburn & R. R. Co., 36 Barb. 600.

[340] Dodge v. Colby, 37 Hun, 515.

[341] Thomas v. Utica & B. R. R. Co., 97 N. Y. 245.

[342] Code Civ. Proc. § 484, subd. 5; Vandevoort v. Gould, 36 N. Y. 639.

[343] Holmes v. Davis, 19 N. Y. 488; Livingston v. Tanner, 12 Barb. 481

[344] Code Civ. Proc. § 484, subd. 6.

[345] Hall v. Louis Weber Bldg. Co., 36 Misc. 551.

[346] Benedict v. Guardian Trust Co., 58 App. Div. 302.

estate, to secure its payment in favor of a third person, to whom defendant delivered them for a consideration.[347]

—— **(7) Causes of action to recover chattels.** Causes of action to recover chattels with or without damages for the taking or detention thereof, may be joined,[348] but not with a cause of action on contract.[349]

—— **(8) Causes of action on claims against a trustee.** Causes of action on claims against a trustee, by virtue of a contract, or by operation of law, may be joined,[350] but this provision applies only to simple breaches of trust,[351] and the liability of the trustee must arise simply from the trustee occupying that position and not by operation of law and fact.[352] Executors and administrators are trustees, within the provision, as well as trustees eo nomine.[353] The provision does not authorize the joinder of claims against a trustee in his representative capacity with a cause of action against him in his individual capacity,[354] nor does it permit the joinder of causes of action against a trustee with causes of action against one who is not a co-trustee.[355]

—— **(9) Causes of action arising out of the same transaction or transactions connected with the same subject of action.** As to when claims arise "out of the same transac-

[347] De Silver v. Holden, 50 Super. Ct. (18 J. & S.) 236, 6 Civ. Proc. R. (Browne) 121.

Compare Cleveland v. Barrows, 59 Barb. 364.

[348] Code Civ. Proc. § 484, subd. 7, § 1689; Maxwell v. Farnam, 7 How. Pr. 236, which holds that a cause of action for conversion can not be joined with a cause of action for redelivery, seems to have been decided without consideration of this section.

[349] Furniss v. Brown, 8 How. Pr. 59.

[350] Code Civ. Proc. § 484, subd. 8; Bosworth v. Allen, 168 N. Y. 157. Causes of action arising out of a breach of trust by a testator may be united in an action against his executor, brought by the surviving trustee. Price v. Brown, 10 Abb. N. C. 67, 60 How. Pr. 511.

[351] Dennis v. Kennedy, 19 Barb. 517.

[352] French v. Salter, 17 Hun, 546, which held that a cause of action against a trustee of an insolvent bank for making improper investments can not be united with a cause of action on a bond given by him to assist in making up a deficiency in the assets of the bank.

[353] Landau v. Levy, 1 Abb. Pr. 376.

[354] Smith v. Geortner, 40 How. Pr. 185.

[355] Alger v. Scoville, 1 Code R., N. S., 303.

tion or transactions connected with the same subject of action," it has been said that "it is impracticable to lay down a general rule. * * * It is safer to pass on the question as each case is presented."[356] However, the rule has been stated that where the matter in controversy arises out of a contract, "transaction" means the whole proceedings, commencing with the negotiation and ending with performance.[357] It has also

[356] Wiles v. Suydam, 64 N. Y. 173, in which it is further said: "It is probable that the primary purpose of this provision was intended to apply to equitable actions, which frequently embrace many complicated acts and transactions relating to the subject-matter of the action, which it would be desirable to settle in a single controversy."

In New York & N. H. R. Co. v. Schuyler, 17 N. Y. 592, Justice Comstock said: "In respect to the joinder of causes of action, the provision of law, so far as material to the question, now is, that 'the plaintiff may unite in the same complaint several causes of action, whether they be such as have heretofore been denominated legal or equitable, or both, where they all arise out of the same transaction or transactions connected with the same subject of the action.' (Code of 1855, § 167.) The authors of the Code, in framing this and most of its other provisions, appear to have had some remote knowledge of what the previous law had been. This provision, as it now stands, was introduced in the amendment of 1852, because the successive Codes of 1848, 1849 and 1851, with characteristic perspicacity, had in effect abrogated equity jurisdiction in many important cases, by failing to provide for a union of subjects and parties in one suit indispensable to its exercise. This amendment, therefore, was not designed to introduce any novelty in pleading or practice. Its language is, I think, well chosen for the purpose intended, because it is so obscure and so general as to justify the interpretations which shall be found most convenient and best calculated to promote the ends of justice. It is certainly impossible to extract from a provision so loose and yet so comprehensive any rules less liberal than those which have long prevailed in courts of equity." So it has been said that the term transaction as used in the Code is not confined to a single one of a series of connected acts, transpiring at the same time. It means something broad enough to embrace more than one cause of action, broad enough even to embrace causes of action belonging to different subdivisions of the section. The word "transactions," used in such a connection, as well as in common parlance, is comprehensive enough to include the breaking down of a market stand, tearing down partition, fixtures, etc., blocking it up and carrying away the goods and fixtures. Polley v. Wilkisson, 5 Civ. Proc. R. (Browne) 135, 140.

[357] Robinson v. Flint, 7 Abb. Pr. 393, note.

been stated that the test is whether the parties joined in the suit have one connected interest centering in the point in issue in the cause, or one common point of litigation.[358] Conceding that the phrase is not subject to precise definition, yet certain rules have been laid down from which, by a process of exclusion, a fair idea can be obtained as to its meaning. In the first place, causes of action arising at the same time, do not necessarily arise from the same transaction.[359] Secondly, it

[358] Mahler v. Schmidt, 43 Hun, 512; Doyle v. American Wringer Co., 60 App. Div. 525, which held that assault and forcible entry and taking arose from same transaction.

[359] "It by no means follows that because the two causes of action originated, or happened, at the same time, each cause arose out of the same transaction. It is certainly neither physically nor morally impossible that there should be two transactions occurring simultaneously, each differing from the other, in essential attitudes and qualities. As here, the transaction out of which the cause of action for the assault springs, is the beating, the physical force used; while the transaction out of which the cause of action for slander springs, is not the beating, or the force used, but defamatory words uttered. The maker of a promissory note might, at the very instant of its delivery and inception, falsely call the payee a thief; and yet who would say that the two causes of action arose out of the same transaction? It has been held that a contract of warranty and a fraud practiced in the sale of a horse, at the same trade, did not arise out of the same transaction, so as to be connected each with the same subject of action, and that a complaint containing both causes of action was demurrable (Sweet v. Ingerson, 12 How. Pr. 331). * * * Assault and battery and slander are as separate and distinct causes of action as any two actions which can be named. True they are both torts, but they do not belong to the same category or class, either at common law or by the Code. Indeed, the Code, in express terms, enumerates and classifies them separately. The subjects of the two actions are not connected with each other. Each subject of action is as distinct and different from the other as the character of an individual is from his bodily structure. The question is not whether both causes of action sprung into existence at the same moment of time. Time has very little to do in solving the real question. The question is, did each cause of action accrue or arise out of the same transaction, the same thing done? It is apparent that each cause of action arose, and indeed must necessarily have arisen out of the doing of quite different things, by the defendant." Anderson v. Hill, 53 Barb. 238, which expressly overruled Brewer v. Temple, 15 How. Pr. 286. See, also, De Wolfe v. Abraham, 151 N. Y. 186.

does not necessarily follow that causes of action arise out of the same transaction because the same act renders the defendant liable in both causes of action.[360] Thirdly, it should be kept in mind that the word "transaction" is not synonymous with the phrase "subject of action" inasmuch as to so construe would be to make the Code provision an absurdity since it expressly allows a joinder of claims arising out of the same transaction, "or transactions connected with the same subject of action." "Subject of action" is defined by Pomeroy as "the physical facts, the things real or personal, the money, lands, chattels, and the like, in relation to which the suit is prosecuted."[361] It may be stated that causes of action based on contract and on tort may arise from the same transaction as may two causes of action for a tort though ordinarily two causes of action based on a tort cannot be said to arise from the same "transaction."

As examples of causes of action held to arise from the same transaction or from transactions connected with the same subject of action may be mentioned the following: Causes of action to foreclose two mortgages where no judgment for deficiency is sought;[362] causes of action by abutting owner for injury to property and to person by operation of railroad;[363] cause of action to cancel a bond illegally executed by executors, and one to recover from one of the defendants money delivered to him as security for the performance of its terms;[364] cause of action for commissions on work performed and materials furnished and cause of action for breach of the agreement for the work.[365] So a claim by plaintiffs as testamentary trustees of

[360] Taylor v. Metropolitan El. Ry. Co., 52 Super. Ct. (20 J. & S.) 299; Keep v. Kauffman, 36 Super. Ct. (4 J. & S.) 141.

[361] Pom. Code Rem. (3d Ed.) p. 535.

[362] Morrissey v. Leddy, 11 Civ. Proc. R. (Browne) 438.

[363] Lamming v. Galusha, 135 N. Y. 239; Griffith v. Friendly, 30 Misc. 393. Compare Crowell v. Truesdell, 67 App. Div. 502. But see Taylor v. Metropolitan El. Ry. Co., 52 Super. Ct. (20 J. & S.) 299, where the contrary is held where the personal injury was to one plaintiff while the property injury was to both plaintiffs. See Howe v. Peckham, 10 Barb. 656, which holds there is but one cause of action.

[364] Zimmerman v. Kunkel, 6 State Rep. 768.

[365] Van Keuren v. Miller, 78 Hun, 173, 60 State Rep. 202.

a devisee of real estate, against defendant as life tenant for failure to pay taxes, and a claim for advances made by the devisee to defendant to defray the expenses of probating the will under which both took, and which defendant agreed to repay out of the rents and profits, concern transactions connected with the same subject.[366] And the committee of a lunatic may bring an action against persons claiming separate liens upon the property of the lunatic to ascertain the lunatic's interest in the property, and incidentally the validity and extent of the liens thereon held by defendants, the property being in such case the "subject of the action."[367]

On the other hand, the following may be mentioned as examples of causes of action held not to arise from the same transaction or transactions connected with the same subject of action:[368] Cause of action on a warranty and a cause of action for false representations in respect to the subject of the warranty;[369] cause of action for assault and cause of action for slander;[370] cause of action to partition testator's real estate and cause of action to establish a debt against the estate;[371] cause of

366 Corcoran v. Mannering, 75 State Rep. 1437, 10 App. Div. 516.

367 Holmes v. Abbott, 53 Hun, 617, 25 State Rep. 644.

368 Compare Hynes v. Farmers' Loan & Trust Co., 31 State Rep. 136; Taylor v. Metropolitan El. Ry. Co., 52 Super. Ct. (20 J. & S.) 299.

The cause of action against a stockholder for the debts of the corporation, when the stock has not been paid in and a certificate filed, and the liability of a trustee, for not filing an annual report, for all the corporation's debts, do not arise out of transactions connected with the same subject of action. Wiles v. Suydam, 64 N. Y. 173.

Causes of action against a director of a corporation personally, for failure to file a report, and for consenting to the creation of an indebtedness, not secured by mortgage, in excess of the capital stock, since not arising from the same transaction or transactions connected with the same subject of action. Motley v. Pratt, 13 Misc. 758, 69 State Rep. 300.

Causes of action based on fraud cannot be joined where separate acts of fraud must be proved. Wheeler v. Gleason, 34 Misc. 604. But where the operation of the fraud is joint, though the fraud is single, the causes of action may be joined. Bradley v. Bradley, 165 N. Y. 183.

369 Sweet v. Ingerson, 12 How. Pr. 331.

370 Anderson v. Hill, 53 Barb. 238, overruling Brewer v. Temple, 15 How. Pr. 286.

371 Letson v. Evans, 33 Misc. 437.

action against attorneys for violation of their agreement to properly prosecute an action, and cause of action under statute imposing treble damages for a willful delay of a case with a view to the attorney's own gain;[372] claim to recover possession of a farm house and yard occupied by plaintiff's permission, and a claim for damages for trespass on other parts of the farm in plaintiff's possession.[373]

Another matter for consideration under this subdivision nine is the meaning of the phrase "and not included within one of the foregoing subdivisions of this section," as used in connection with the provision authorizing causes of action to be joined if they relate to the same transaction, etc. On the one hand it has been held that said clause means that a cause of action included within any one of the previous subdivisions cannot be united with a cause of action included in any other one of the subdivisions, notwithstanding that they relate to the same transaction.[374] But this view is not looked on with favor and the later cases hold that the phrase means "not included within one 'only.'" In other words, causes of action which are not all included in any one of the foregoing subdivisions, that is, which belong to different ones, may nevertheless be united if they arise out of the same transaction or transactions connected with the same subject of action.[375]

—— **(10) Causes of action for penalties incurred under the fisheries, game and forest law.** Subdivision 10, authorizing the uniting of causes of action for penalties incurred under the fisheries, game and forest law, was added by Laws 1900, c. 590. Such a cause of action can not, however, be joined with another cause of action on the ground that

372 Barkley v. Williams, 30 Misc. 687.

373 Hulce v. Thompson, 9 How. Pr. 113.

374 Sullivan v. New York, N. H. & H. R. Co., 1 Civ. Proc. R. (McCarty) 285; Landau v. Levy, 1 Abb. Pr. 376. See, also, People v. Wells, 52 App. Div. 583; Raynor v. Brennan, 40 Hun, 60.

375 Polley v. Wilkisson, 5 Civ. Proc. R. (Browne) 135, 140. This view is supported by the late cases of Eagan v. New York Transp. Co., 39 Misc. 111, and McInerney v. Main, 81 N. Y. Supp. 539, which held that a claim for injury to the person and a claim for injury to property, resulting from the same tortious act, may be sued for in the same action.

they both arise out of the same transaction, since this subdivision is not one of the "foregoing" subdivisions of the Code section so as to be included within subdivision nine.[376]

§ 53. Causes of action must belong to one of subdivisions.

The concluding part of section 484 provides that it must appear on the face of the complaint that all the causes of action so united "belong to one of the foregoing subdivisions of this section." This does not require that causes of action to be united must in all cases belong to one and one only of the first eight subdivisions, since subdivision nine is one of the "foregoing subdivisions," as well as the eight others, and to give effect to the whole, it is necessary to hold that any and all causes of action, "arising out of the same transaction," are a class by themselves which may be united, providing they meet the other conditions contained in the closing paragraph of the section.[377]

§ 54. Consistency of causes of action.

It must appear on the face of the complaint that the causes of action are consistent with each other.[378] This requirement was not embraced in the Code of Procedure, but first came into the Code of Civil Procedure by amendment in 1877. The fact that in case of default the manner of applying for judgment may be different on the different counts, does not, how-

376 People v. Wells, 52 App. Div. 583, holding that a cause of action under subdivision 10 cannot be united with a cause arising under subdivisions 1 to 8, inclusive.

377 Polley v. Wilkisson, 5 Civ. Proc. R. (Browne) 135, 140. It is believed that this is the correct rule though the courts have several times indicated the contrary. To hold otherwise is to practically eliminate subdivision 9.

378 Code Civ. Proc. § 484, last subdivision. Conde v. Rogers, 74 App. Div. 147; Perkins v. Slocum, 82 Hun, 366. But see Krower v. Reynolds, 99 N. Y. 245, which holds that "a plaintiff may join in his complaint different and even inconsistent causes of action, provided only that they all belong to one of the classes mentioned in section 484 of the Code." This decision seems to be in direct conflict with the Code provision and is doubtless merely an unguarded remark made without a consideration of the last subdivision of section 484.

ever, make the causes of action inconsistent.[379] The following may be mentioned as examples of inconsistent causes of action: Causes of action for breach of warranty in sale and for fraud in concealing defects on the same sale;[380] cause of action for injunction against breach of covenant in lease and for forfeiture of lease;[381] cause of action for statutory penalty and for injunction against the offense;[382] causes of action on express and on implied contract relating to same transaction;[383] causes of action for money had and received and for trover.[384] On the other hand, a cause of action against a railroad company, based on covenant, to compel the construction of a farm crossing is consistent with a cause of action based on the statute,[385] as is a cause of action against corporate trustees for failure to file annual report and a cause of action for a false report.[386]

§ 55. Causes of action must affect all the parties.

The Code provides that it must appear on the face of the complaint that the causes of action affect all the parties to the action, except as otherwise prescribed by law.[387] But it is not necessary that the various causes of action affect all the parties

[379] Kent v. Crouse, 5 State Rep. 141.

[380] Sweet v. Ingerson, 12 How. Pr. 331.

[381] Linden v. Hepburn, 5 Super. Ct. (3 Sandf.) 668, 5 How. Pr. 188, 3 Code R. 165.

[382] Lamport v. Abbott, 12 How. Pr. 340.

[383] Gardner v. Locke, 2 Civ. Proc. R. (Browne) 252.

[384] Dodge v. Glendenning, 10 State Rep. 8, 27 Wkly. Dig. 143.

Further illustrations of causes of action held inconsistent, see 8 Abb. Cyc. Dig. 381, 382.

[385] Haynes v. Buffalo, N. Y. & P. R. Co., 38 Hun, 17.

[386] Butler v. Smalley, 49 Super. Ct. (17 J. & S.) 492.

[387] Code Civ. Proc. § 484, last subd.; Nagel v. Lutz, 41 App. Div. 193; Gardner v. Ogden, 22 N. Y. 327; Sortore v. Scott, 6 Lans, 271; Van Liew v. Johnson, 6 Thomp. & C. 648, 4 Hun, 415; Equitable Life Assur. Soc. of U. S. v. Schermerhorn, 60 How. Pr. 477; Pracht v. Ritter, 48 Super. Ct. (16 J. & S.) 509; Kelly v. Newman, 62 How. Pr. 156; Goldmark v. Magnolia Anti-Friction Metal Co., 30 App. Div. 580; Mahler v. Schmidt, 43 Hun, 512, which was an action to set aside a fraudulent conveyance, annul liens, etc. It seems that this case might be considered as containing only one cause of action.

equally.[388] Where the real objection is that rights not necessarily connected are asserted against separate defendants who should be sued separately, the objection is to a misjoinder of causes of action rather than to a misjoinder of parties. The provision is aimed against what was known in the chancery practice as multifariousness, and is but a restatement of one of the earliest rules of the court of chancery.[389] The rule applies to plaintiffs as well as to defendants. The question generally arises where the causes of action create against defendants unequal and different liability.[390]

It will be noticed that the Code says that the causes of action must affect all the parties to the action, "except as otherwise prescribed by law." Section 167 of the Code of Procedure authorized plaintiff to unite in his complaint several causes of action, subject to the qualification that the causes of action so united must belong to one of the classes specified, "and except in the action for the foreclosure of mortgages, must affect all the parties to the action," and in respect to actions for the foreclosure of mortgages, it incorporated the provisions of the Revised Statutes. It was held that such section by implication prohibited the union of a cause of action for the enforcement of a lien with an action for the recovery of a debt, except in the case of a mortgage secured by a bond or other obligation of the mortgagor, or of a third person.[391] The Code of Civil Procedure, however, omitted the reference to actions for foreclosure of mortgages, and substituted the words "except as otherwise prescribed by law," and it was then held that a cause of action for money loaned, and a cause of action for the enforcement of a lien on specific avails of certain real estate mortgaged to secure the loan, and sold under an order of the court, by the committee of the mortgagor who had become

[388] Vermeule v. Beck, 15 How. Pr. 333; Gray v. Fuller, 17 App. Div. 29, which distinguishes between legal and equitable causes of action.

[389] Cummings v. American Gear & Spring Co., 68 State Rep. 653, 655.

[390] Can a general prayer for costs applying to all of defendants affect the question as to whether defendants are all affected? The proposition seems to be answered in the affirmative in Cummings v. American Gear & Spring Co., 68 State Rep. 653.

[391] Burroughs v. Tostevan, 75 N. Y. 567, followed in Schillinger Fire-Proof Cement & Asphalt Co. v. Arnott, 14 N. Y. Supp. 326.

insane, could be united in the same complaint.[392] The words, "except as otherwise prescribed by law," evidently refer to section 1627 of the Code of Civil Procedure, which provides that in an action brought to foreclose a mortgage, any person who is liable to the plaintiff for the payment of the debt secured by the note may be a defendant in the action, and the final judgment may award payment by him of the residue of the debt remaining unsatisfied after a sale of the mortgaged property. This section has been applied to an action where two mortgages are being foreclosed together and where the personal liability is several, as where some of the defendants were liable for one mortgage debt and other defendants for the other mortgage debt.[393]

The following causes of action, inter alia, have been held improperly united because not affecting all the parties: Action for equitable relief against a corporation and claim for damages against individual defendants;[394] claim against A. for erecting an obstruction on plaintiff's private way and claim against B. for continuing the same obstruction;[395] cause of action on a judgment or other contract against A. and similar one against A. and B. jointly;[396] action against firm and individual members where there had been changes in the firm so that the three causes of action did not affect all the defendants.[397] The following are illustrations of the rule as applied to plaintiffs: Causes of action in favor of plaintiff individually and in favor of the corporation;[398] causes of action for negligence, causing death of one person of whose estate plaintiff is the administrator and for the death of another person of whose estate he is also administrator;[399] causes of action for injury to the property of two persons in partnership and for injuries

[392] Parmerter v. Baker, 24 Abb. N. C. 104, 27 State Rep. 635.
[393] Morrissey v. Leddy, 11 Civ. Proc. R. (Browne) 438; Nichols v. Drew, 94 N. Y. 22, 26.
[394] House v. Cooper, 16 How. Pr. 292. But see Code Civ. Proc. § 1790.
[395] Hess v. Buffalo & N. F. R. Co., 29 Barb. 391.
[396] Barnes v. Smith, 16 Abb. Pr. 420, 24 Super. Ct. (1 Rob.) 699.
[397] Benton v. Winner, 69 Hun, 494, 52 State Rep. 628.
[398] Farrow v. Holland Trust Co., 74 Hun, 585, 57 State Rep. 163.
[399] Danaher v. City of Brooklyn, 4 Civ. Proc. R. (Browne) 286.

from the same wrong to the person of one of the partners;[400] causes of action for possession of lands by two persons, each claiming the whole land by a title hostile to that of the other.[401]

§ 56. Parties suing or sued in different capacities.

A cause of action against an executor, administrator, or trustee, in his representative capacity can not ordinarily be united with one against the same individual personally;[402] but the Code now provides that an action may be brought against an executor or administrator personally, and also in his representative capacity, (1) where the complaint sets forth a cause of action against him in both capacities, or states facts which render it uncertain in which capacity the cause of action exists against him, or (2) where the complaint sets forth two or more consistent causes of action not requiring different places or modes of trial, which grow out of the same transaction or transactions connected with the same subject of action.[403] Thus, a

[400] Taylor v. Manhattan Ry. Co., 53 Hun, 305, 25 State Rep. 226.

[401] Hubbell v. Lerch, 58 N. Y. 237.

[402] Ferrin v. Myrick, 41 N. Y. 315, which states the rule, on a review of the decisions, to be:

"1. that for all causes of action arising upon a contract made by the testator in his lifetime, an action can be sustained against the executor as such, and the judgment would be de bonis intestatoris.

"2. that in all causes of action, where the same arises upon a contract made after the death of the testator, the claim is against the executor, personally, not against the estate, and the judgment must be de bonis propriis.

"3. that these different causes of action cannot be united in the same complaint."

Smith v. Geortner, 40 How. Pr. 185. President of corporation cannot be sued as individual and in representative capacity (Warth v. Radde, 18 Abb. Pr. 396, 28 How. Pr. 230; Paulsen v. Van Steenbergh, 65 How. Pr. 342); though claim against stockholder as such and as trustee was allowed in Wiles v. Suydam, 6 Thomp. & C. 292. Receiver cannot be sued as individual and in representative capacity. Brandt v. Siedler, 10 Misc. 234, 63 State Rep. 381.

Causes of action against a firm of which a lunatic was a member, and against the lunatic's estate, and against his committee individually, held to have been improperly joined. Kent v. West, 33 App. Div. 112.

[403] Code Civ. Proc. § 1815; Blum v. Dabritz, 81 N. Y. Supp. 315; Perkins v. Slocum, 82 Hun, 366; Metropolitan Trust Co. v. McDonald, 52 App. Div. 424; Newcombe v. Lottimer, 35 State Rep. 614.

complaint in an action against an administratrix as such, and individually for the funeral expenses of her husband, is not open to objection.[404] The converse of this proposition, that a cause of action accruing to a person individually cannot be united with a cause of action accruing to him in his representative capacity, seems to be also true;[405] but it has been held that one may sue as an executor and as devisee where both causes of action arose from a contract made by the testator with defendant concerning the same matter.[406] Cause of action against a stockholder founded on an implied contract cannot be joined with a cause of action against him as trustee, on a liability created by operation of law,[407] and the same rule applies where causes of action against a director personally, for failure to file a report, and for consenting to creation of unauthorized indebtedness, are united.[408]

§ 57. Causes of action requiring different places of trial.

The concluding paragraph of section 484 provides that it must appear on the face of the complaint that the causes of action do not require different places of trial.

[404] Murphy v. Naughton, 68 Hun, 424, 52 State Rep. 756.

[405] So held as to executors and administrators. Wiltsie v. Beardsley, Hill & D. Supp. 386; Lucas v. New York Cent. R. Co., 21 Barb. 245. The right to rents and profits accrued before the devisor's death, vests in his personal representatives; but they cannot unite with the devisee as plaintiffs. Spier v. Robinson, 9 How. Pr. 325.

[406] Benjamin v. Taylor, 12 Barb. 328; Armstrong v. Hall, 17 How. Pr. 76. See, also, McCrea v. New York El. R. Co., 13 Daly, 302, 23 Wkly. Dig. 334; Shepard v. Manhattan Ry. Co., 117 N. Y. 442. See, however, Jacobson v. Brooklyn El. R. Co., 22 Misc. 281, where the executors of the deceased owner of property abutting upon an elevated railroad, and devisees thereof, joined as plaintiffs in an action for all the damages, and it was held that there was an improper joinder of causes of action.

[407] Mappier v. Mortimer, 11 Abb. Pr. N. S. 455. But see Sterne v. Herman, 11 Abb. Pr., N. S., 376, holding that but one cause of action is stated. Wiles v. Suydam, 64 N. Y. 173. See, also, French v. Salter, 17 Hun, 546.

[408] Motley v. Pratt, 13 Misc. 758, 69 State Rep. 300.

§ 58. Causes of action ex contractu and ex delicto.

The common law rule that causes of action based on contract cannot be joined with causes of action based on a tort, still exists under the Codes,[409] with the exception that such causes of action may be joined where they arise out of the same transaction or transactions connected with the same subject of action.[410]

—— **Implied contract and tort.** The same rule applies where the cause of action ex contractu is based on an implied contract, it being held that causes of action based on tort and on implied contract, such as for money had and received, cannot be united unless they arise out of the same transaction.[411]

§ 59. Causes of action relating to marriage.

A cause of action for limited divorce on a ground such as

[409] Deceit and guaranty. Waller v. Raskan, 12 How. Pr. 28.

Breach of covenant and conversion. Keep v. Kaufman, 56 N. Y. 332.

Conversion and accounting. Thompson v. St. Nicholas Nat. Bank, 61 How. Pr. 163; Teall v. City of Syracuse, 32 Hun, 332.

Negligence and contract for rent. Compton v. Hughes, 38 Hun, 377.

Breach of covenant and trespass. Week v. Keteltas, 10 Civ. Proc. R. (Browne) 43.

A cause of action against a corporation for the specific enforcement of a contract cannot be united with a cause of action belonging derivatively to the plaintiff as a stockholder of another corporation, based upon the malfeasance and mismanagement of the directors of the latter company, where the stock, upon the ownership of which the second cause of action is based, is to be received by the plaintiff through the specific performance of the contract embraced in the first cause of action, such joinder being objectionable on the ground that the one cause of action is upon contract and the other in tort. Stanton v. Missouri Pac. Ry. Co., 15 Civ. Proc. R. (Browne) 296.

[410] Mackenzie v. Hatton, 6 Misc. 153; Grimshaw v. Woolfall, 40 State Rep. 299.

[411] Woodbury v. Delap, 1 Thomp. & C. 20; Flynn v. Bailey, 50 Barb. 73.

But see American Nat. Bank of Providence v. Grace, 64 Hun, 22, 46 State Rep. 49, where causes of action were held to not arise out of same transaction.

The rule under the Code of Procedure was that there could be no joinder notwithstanding the causes of action arose out of the same transaction. Hunter v. Powell, 15 How. Pr. 221.

cruelty cannot be joined with a cause of action for an absolute divorce on the ground of adultery, since the charges are independent, and lead to distinct issues and decrees. This has been held both before and after the Codes.[412]

§ 60. Causes of action against corporation and its members.

General questions arising under section 484 of the Code of Civil Procedure have been before considered,[413] but it remains to consider section 1790 which provides that where an action is brought by a creditor of a corporation, and the stockholders, directors, trustees, or other officers, or any of them, are made liable by law for the payment of his debt, the persons so made liable may be made parties defendant and their liability declared or enforced by the judgment in the action. This provision has been held to authorize the joinder of a cause of action to set aside a collusive judgment against a corporation with a cause of action against directors for a false report.[414]

[412] Johnson v. Johnson, 6 Johns. Ch. 163; Smith v. Smith, 4 Paige, 92; McIntosh v. McIntosh, 12 How. Pr. 289; Henry v. Henry, 17 Abb. Pr. 411, 27 How. Pr. 5. Cause of action for dissolution of marriage and cause of action for separation and maintenance cannot be joined, since they may require different modes of trial. Buchholz v. Buchholz, 1 How. Pr., N. S., 46; Zorn v. Zorn, 38 Hun, 67.

[413] See ante, §§ 52-57.

[414] Cummings v. American Gear & Spring Co., 68 State Rep. 653.

CHAPTER II.

STEPS PRELIMINARY TO COMMENCEMENT OF ACTION.

ART. I. DEMAND.

ART. VI. GUARDIAN AD LITEM FOR PLAINTIFF.

ART. I. DEMAND.

§ 61. General necessity.

A demand, as a condition precedent, may be required by statute or by contract, or it may be necessary to constitute a cause of action as where it is one of the elements of the cause of action, as in trover where the original taking is lawful.

§ 62. Where agreement is for payment of money.

A demand is generally not required where payment, under a contract, is to be made in money,[1] and the rule is not confined to bills, notes and bonds, but includes all agreements for the payment of money.[2]

§ 63. Where money is received or collected for another's use.

A demand is not necessary before suing to recover money in the hands of a defendant where it is the duty of defendant to apply the money in his hands without any demand being made.[3] Thus a sheriff may be sued for money received by virtue of an execution, without a previous demand,[4] as may an agent who receives money for another and fails to pay it over in a reasonable time.[5]

§ 64. Where money is paid by mistake.

In order to recover money paid by mistake, where the party

[1] Counsel v. Vulture Min. Co. of Arizona, 5 Daly, 74; Clute v. McCrea, 48 Hun, 617, 1 N. Y. Supp. 96. See, also, Bogardus v. Young, 64 Hun, 398.

[2] Locklin v. Moore, 57 N. Y. 360.

[3] Stacy v. Graham, 14 N. Y. (4 Kern.) 492.

[4] Nelson v. Kerr, 2 Thomp. & C. 299; Dygert v. Crane, 1 Wend. 534.

[5] Hickok v. Hickok, 13 Barb. 632.

receiving knew of the mistake when he received it, a demand is not required.[6]

§ 65. Where inn-keeper loses property of guest.

A demand need not be made before suing an inn-keeper for the loss of the goods of a guest where it appears that after diligent search and inquiry, the goods could not be found,[7] or that the goods are lost.[8]

§ 66. Demand for rent.

The general rule is that it is not a condition precedent to an action to recover rent, that a demand be made,[9] especially where the rent is payable in services.[10]

§ 67. Demand before suing on negotiable instruments.

The necessity of making a demand before suing on a negotiable instrument, as it involves to a large extent matters of substantive law, will not be treated of here, except by merely stating that if a note is payable on demand generally, an action may be commenced on it without a previous demand,[11] but where a note is payable after demand, or at a particular place, a demand is necessary.[12]

§ 68. Where action is against common carrier.

A common carrier is liable where it has delivered goods to one not entitled to receive them, though no demand has been made by the owner who sues,[13] or where it has not brought the

[6] Sharkey v. Mansfield, 90 N. Y. 227.

[7] Clute v. Wiggins, 14 Johns. 175; Van Wyck v. Howard, 12 How. Pr. 147; Cheesebrough v. Taylor, 12 Abb. Pr. 227.

[8] McDonald v. Edgerton, 5 Barb 560; Willard v. Reinhardt, 2 E. D. Smith, 148.

[9] Remsen v. Conklin, 18 Johns. 447; Gruhn v. Gudebrod Bros. Co., 21 Misc. 528.

[10] Van Rensselaer's Ex'rs v. Gallup, 5 Denio, 454; Livingston v. Miller, 11 N. Y. (1 Kern.) 80.

[11] Hirst v. Brooks, 50 Barb. 334.

[12] Ferner v. Williams, 37 Barb. 9, 14 Abb. Pr. 215.

[13] Lester v. Delaware, L. & W. R. Co., 92 Hun, 342; Fulton v. Lydecker, 41 State Rep. 457.

goods to the place of destination, where it had no office or agent at such place, so that a demand could be made there.[14]

§ 69. Demand before suing for conversion.

The general rule is that where the person sought to be charged with the conversion of personal property came lawfully into possession of the property, a demand is necessary,[15] but not where the original taking was wrongful,[16] as where it was obtained by fraud or false pretenses,[17] though where one who receives goods by mistake lends himself to perpetuate the mistake, he may be regarded as an original wrong-doer so that no demand need be made.[18] Thus a bona fide purchaser at a sheriff's sale is not liable for a conversion without a demand,[19] nor is a purchaser at a public auction,[20] or an officer who takes goods under process.[21] A mere naked bailee is not liable to the bailor without a demand.[22]

§ 70. Demand before bringing replevin.

The rules applicable to the necessity of a demand before bringing trover for conversion, apply where it is sought to recover the property itself by means of the action formerly known as replevin.[23]

§ 71. Excuses for omission to make demand.

Where a demand will be unavailing, if made, as where the

[14] Schroeder v. Hudson River R. Co., 12 Super. Ct. (5 Duer) 55.

[15] Hovey v. Bromley, 85 Hun, 540, 67 State Rep. 147; Delahunty v. Hake, 20 App. Div. 430.

[16] Thompson v. Vroman, 66 Hun, 245, 49 State Rep. 537; Marshall v. De Cordova, 26 App. Div. 615.

[17] Ladd v. Moore, 5 Super. Ct. (3 Sandf.) 589; Rowne v. McGovern, 9 Wkly. Dig. 336.

[18] Purves v. Moltz, 2 Abb. Pr., N. S., 409, 32 How. Pr. 478, 28 Super. Ct. (5 Rob.) 653.

[19] Gillet v. Roberts, 57 N. Y. 28.

[20] Jackson v. Chapman, 29 Misc. 129.

[21] Hicks v. Cleveland, 39 Barb. 573.

[22] Brown v. Cook, 9 Johns. 361.

[23] See Onondaga Nation v. Thacher, 29 Misc. 428.

property converted has been sold,[24] or where for other reasons it is impossible to comply with the demand if made,[25] a demand may be excused, but failure to make a necessary demand is not excused by showing an improbability of its being complied with, nor by the fact that the right to a compliance is denied and contested on the trial.[28]

§ 72. Sufficiency of demand.

No general rule can be laid down as to the sufficiency of a demand, since each case must largely depend on particular circumstances. It would seem that the demand must be sufficiently specific to enable the person on whom the demand is made to fully understand the nature and extent thereof. In regard to the person on whom a demand should be made, it is sufficient to make a demand on one of several joint debtors or joint owners.[27] Where the demand is against a corporation, it must be on a person known to represent it,[28] such as a director under whose instructions the act was done,[29] it being held insufficient to make a demand for payment on the treasurer of a company at a branch office without notice to the president and other officers at the main office.[30]

ART. II. NOTICE.

§ 73. After the cause of action has accrued, notice is often required to be given before suing, and, even where not necessary, it is often advisable to prevent litigation or to put the giver thereof, if he sues, in a favorable position in regard to costs and matters resting in the discretion of the court.

[24] Doner v. Williams, 20 Wkly. Dig. 456; Reading v. Lamphier, 31 State Rep. 53.

[25] Schroeder v. Hudson River R. Co., 12 Super. Ct. (5 Duer) 55.

Collection of cases as to excuse for failure to make demand before bringing trover, see 3 Abb. Cyc. Dig. 1072.

[26] Southwick v. First Nat. Bank, 84 N. Y. 420.

[27] Scholey v. Halsey, 72 N. Y. 578; Jessop v. Miller, 2 Abb. App. Dec. 449, 1 Keyes, 321; Ball v. Larkin, 3 E. D. Smith, 555.

[28] Langworthy v. New York & H. R. Co., 2 E. D. Smith, 195.

[29] Dunham v. Troy Union R. Co., 1 Abb. App. Dec. 565, 3 Keyes, 543.

[30] Levey v. Union Print Works, 34 State Rep. 900.

Familiar examples are actions against insurance companies where the policy requires the giving of notice and proofs of loss, actions against municipal corporations for personal injuries,[31] actions on undertakings given on appeal where notice of entry of judgment or order of affirmance must be given,[32] actions against person continuing a nuisance where notice must be given, etc., all of which will be fully considered in subsequent chapters.

A recent statute requires notice of a personal injury to be given by the injured employe to his employer,[33] and it has been held thereunder that the mere service of the complaint in the action is not sufficient as a notice though served within the statutory time,[34] and that the fact that the notice has been given must be alleged in the complaint.[35]

[31] L. 1886, c. 572, require presentation of claims for personal injuries in cities having 50,000 inhabitants or over.

The notice may be in a form such as the following:

"New York City, October 26, 1898.

"Hon. Bird S. Coler, Comptroller of the City of New York, New York City—Dear Sir: Please to take notice that James J. Halpin, residing at the corner of Bailey avenue and Kingsbridge Road, in the borough of the Bronx, city of New York, claims damages in the sum of $10,000 for personal injuries received on the 15th day of October, 1898, caused by falling into a sewer excavation then made at a point on Kingsbridge Road 100 feet, more or less, east of Sedgwick avenue, in said borough and city.

"Very respectfully yours,

"X. A., Claimant's Attorney (Address)."

This question will be considered in full in connection with chapter on actions by or against municipal corporations.

[32] Code Civ. Proc. § 1309.

[33] Laws 1902, c. 600, p. 1748 provides that notice of the time, place, and cause, of a personal injury suffered by an employe must be given to the employer within 120 days after the accident causing the injury or death, and furthermore provides that the notice required shall be in writing and signed by the person injured or by someone in his behalf. It is also provided that if the party injured dies without having given a notice, his executor or administrator may give such notice within 60 days after his appointment. Notice is not deemed invalid or insufficient solely by the reason of any inaccuracy in stating the time, place or cause of the injury, if it be shown that there was no intention to mislead and that the party entitled to notice was not in fact misled thereby.

[34] Johnson v. Roach, 82 N. Y. Supp. 203.

ART. III. TENDER.

§ 74. A tender or payment into court is sometimes a condition precedent as where a person is seeking to disaffirm a contract, in which case it is generally necessary to return or tender the benefits received under the contract so as to put the other party to the contract in statu quo. The equitable maxim, "he who seeks equity, must do equity," applies.

ART. IV. ACTION AGAINST THIRD PERSON.

§§ 75, 76. An action against a third person is sometimes a condition precedent, to prevent circuity of action,[36] but an action against a wrongdoer is not necessary in order to lay the foundation of an action against one receiving from him.[37]

ART. V. LEAVE TO SUE.

§ 77. General rules.

The obtaining leave to sue is not ordinarily a condition precedent, but it is sometimes required by statute, or because of the representative capacity sustained by the proposed plaintiff or defendant. The cases in which leave to sue is required may be roughly grouped as those depending on a statutory requirement and those where the person suing or to be sued is under the protection of the court. In this chapter the cases in which leave to sue is required will be briefly enumerated, leaving a full consideration of the rules for subsequent chapters pertaining to the particular person or subject matter.

§ 78. Leave to sue as part of cause of action.

The obtaining permission to sue is a part of the cause of action so that it must be alleged in the complaint where the statute makes the obtaining such permission a condition precedent to maintaining an action,[38] but not where leave to sue

[35] Gmaehle v. Rosenberg, 80 N. Y. Supp. 705.

[36] Commercial Bank of Albany v. Ten Eyck, 50 Barb. 9. Contra, Bushnell v. Chautauqua County Nat. Bank, 74 N. Y. 290.

[37] Farwell v. Importers' & Traders' Nat. Bank, 90 N. Y. 483.

[38] Scofield v. Doscher, 72 N. Y. 491; Farish v. Austin, 25 Hun, 430;

is required independent of the statute by reason of the representative capacity of a party.

§ 79. Actions where leave to sue is required by statute.

In the following cases leave to sue is required by statute: actions on judgments; actions on debt secured by mortgage while foreclosure suit is pending or has proceeded to final judgment; actions on official bonds; actions by infants for partition; certain actions by plaintiff in attachment; actions by attorney general to annul a corporation; actions against certain cities where notice has not previously been given.

—— **Actions on judgments.** Except in a case where it is otherwise specially provided for by statute, an action on a judgment for a sum of money rendered in a court of record of New York, cannot be maintained between the original parties to the judgment, unless the court in which the action was brought has previously made an order granting leave to bring it, except where ten years have elapsed since the docketing of such judgment or the judgment was by default and the summons served other than personally. Notice of the application for such an order must be given to the adverse party or the person proposed to be made the adverse party, personally, unless it satisfactorily appears to the court that personal notice cannot be given with due diligence, in which case notice may be given in such a manner as the courts directs.[39] This Code provision applies, however, only to courts of record.[40]

—— **Actions on mortgage debt.** While an action to foreclose a mortgage on real property is pending, or after final judgment for the plaintiff therein, no other action shall be commenced or maintained, to recover any part of the mortgage debt, without leave of the court in which the former action was brought.[41]

Freeman v. Dutcher, 15 Abb. N. C. 431; Smith v. Britton, 45 How. Pr. 428. Contra, Krower v. Reynolds, 19 Wkly. Dig. 383; Lane v. Salter, 27 Super. Ct. (4 Rob.) 239.

[39] Code Civ. Proc. § 1913. See chapter on judgments.

[40] Harris v. Clark, 65 Hun, 361.

[41] Code Civ. Proc. § 1628. See chapter on foreclosure of mortgages on land.

—— **Actions by private persons on official bonds.** The official bond of a sheriff who is liable for the escape of a prisoner committed to his custody, or who is guilty of any other actionable default or misconduct in his office,[42] or the bond of a surrogate who is guilty of any actionable default or misconduct in his office,[43] or the bond of a county treasurer who refuses to obey an order or judgment of a court, in regard to payment or delivery, after service on him,[44] may be sued on by a private person, on obtaining leave of court; and, in general, where a public officer is required to give an official bond to the people, and special provision is not made by law, for the prosecution of the bond, by or for the benefit of a person, who has sustained, by his default, delinquency or misconduct, an injury, for which the sureties on the bond are liable, such a person may apply for leave to prosecute the delinquent's official bond.[45]

—— **Action by infant for partition.** An action for the partition of real property cannot be brought by an infant, except by the written authority of the surrogate of the county in which the property, or a part thereof, is situated.[46]

—— **Action by attorney general to annul a corporation.** The attorney general may bring an action against a domestic corporation to procure a judgment, vacating the charter or annulling the existence of the corporation, on obtaining leave of court.[47]

—— **Action by plaintiff in attachment.** Plaintiff in attachment, by leave of the court or judge, may bring, in the name of himself and the sheriff jointly, any action which the sheriff might bring to recover the property attached, or the value thereof, or a demand attached, or on an undertaking given by a person other than the plaintiff, etc.[48]

42 Code Civ. Proc. § 1880.
43 Code Civ. Proc. § 1886.
44 Code Civ. Proc. § 1887.
45 Code Civ. Proc. § 1888.
46 Code Civ. Proc. § 1534.
47 Code Civ. Proc. §§ 1798, 1799.
48 Code Civ. Proc. §§ 677, 678.

§ 80. Actions where leave to sue is required because of parties.

Certain persons appointed by a court cannot sue or be sued without the consent of the court. Thus a clerk of court who is made custodian of certificates by order of the court, cannot be sued in replevin to recover such certificates, without leave of court.[49]

—— **Actions by and against receivers.** A receiver cannot be sued without the consent of the court which appointed him,[50] and to do so is a contempt.[51] On the other hand, a receiver cannot ordinarily sue without leave of court, and if he does, and is unsuccessful, he is liable for costs.[52]

—— **Actions by and against lunatics.** An action cannot be brought against the estate of a lunatic which is under the care and management of a committee, unless leave to sue is obtained,[53] and a lunatic cannot sue, without leave of court, where his property is in the hands of a committee appointed by the court.

§ 81. Granting leave to sue nunc pro tunc.

Leave to sue may be granted nunc pro tunc, after action has been begun,[54] but such leave should not be granted on an ex parte application.[55]

ART. VI. GUARDIAN AD LITEM FOR PLAINTIFF.

§ 82. Guardian for plaintiff.

Before a summons is issued in the name of an infant plaintiff, a competent and responsible person must be appointed to appear as his guardian for the purpose of the action,[56] even

[49] Read v. Brayton, 54 State Rep. 869.

[50] DeGroot v. Jay, 30 Barb. 483.

[51] Taylor v. Baldwin, 14 Abb. Pr. 166.

[52] Phelps v. Cole, 3 Code R. 157; Smith v. Woodruff, 6 Abb. Pr. 65.

[53] Williams v. Estate of Cameron, 26 Barb. 172; Smith v. Keteltas, 27 App. Div. 279.

[54] McKernan v. Robinson, 84 N. Y. 105; Earle v. David, 86 N. Y. 634; Durham v. Chapin, 30 App. Div. 148.

[55] United States Life Ins. Co. v. Poillon, 53 Hun, 636, 6 N. Y. Supp. 370. See, also, Finch v. Carpenter, 5 Abb. Pr. 225.

[56] Code Civ. Proc. § 469.

though the infant is not the only plaintiff.[57] Thus an action relating to the personal estate of an infant, such as an action to recover personalty, though there is a general guardian,[58] or an action to construe a will in a respect affecting an infant legatee, should be brought by the infant by a guardian ad litem.[59] But a guardian ad litem cannot be appointed for an infant where a controversy is submitted on agreed facts.[60] Under the practice prior to the Codes, an infant plaintiff sued by a next friend, and the infant defendant appeared by a guardian, but the Codes required an infant party, whether plaintiff or defendant, to appear by guardian. This difference may be considered as one only in name, but yet it has been held that a complaint and summons should be set aside where a suit was brought by next friend, pursuant to an order granted on motion for appointment of next friend for infant plaintiff.[61] The reason for the appointment of a guardian ad litem, is that there shall be a party responsible for the costs.[62]

§ 83. Application.

The application is by petition and may ordinarily be made to the court in which the action is brought, or a judge thereof, or, if the action is brought in the supreme court, the county judge of the county where the action is triable;[63] but in an action of partition the application must be made to the court.[64] The guardian must be appointed upon the application of the infant, if he is of the age of fourteen years, or upwards; or, if he is under that age, upon the application of his general or testamentary guardian,[65] if he has one, or of a relative or

[57] Matter of Frits, 2 Paige, 374. Contra, Hulburt v. Newell, 4 How. Pr. 93, 2 Code R. 54.

[58] Segelken v. Meyer, 94 N. Y. 473; Buermann v. Buermann, 17 Abb. N. C. 391, 9 Civ. Proc. R. (Browne) 146, 3 How. Pr., N. S., 393.

[59] Wead v. Cantwell, 36 Hun. 528.

[60] Fisher v. Stilson, 9 Abb. Pr. 33.

[61] Hoftailing v. Teal, 11 How. Pr. 188.

[62] People ex rel. Baker v. New York Common Pleas, 11 Wend. 164.

[63] Code Civ. Proc. § 472.

[64] Code Civ. Proc. § 1535; Kennedy v. Arthur, 18 Civ. Proc. R. (Browne) 390, 33 State Rep. 147; Lansing v. Gulick, 26 How. Pr. 250.

[65] A general guardian appointed in another state may apply; Freund v. Washburn, 17 Hun, 543.

friend. If the application is made by a relative or friend, notice thereof must be given to his general or testamentary guardian, if he has one; or, if he has none, to the person with whom the infant resides.[66] The moving papers should consist of a petition; an affidavit of the proposed guardian ad litem showing his pecuniary ability to answer to the infant for any damage sustained by his negligence;[67] and the written consent, duly acknowledged, of the person sought to be appointed guardian, except where the clerk of the court is appointed.[68]

—— Form of petition.

To the ——— Court.[69]

The petition of A. X., an infant, shows:

I. That your petitioner is an infant of the age of ——— years,[70] and is a resident of ———.

II. [Briefly state the cause of action.]

III. That C. D., a resident of ———, in the county of ———, in this state, is a freeholder, and is worth, over and above all the debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution, sufficient to answer for any damage which may be sustained by reason of his negligence or misconduct in the prosecution of the suit herein referred to, as will more fully appear by the affidavit of C. D. hereto annexed.

IV. [If application is ex parte.] That no previous application, etc., has been made herein, except, etc.

Wherefore your petitioner prays that an order be entered appointing C. D., or some other competent person, guardian ad litem to bring such action for your petitioner. [Signature.]

[Date.]

[Verification.]

I, C. D., do hereby consent to be appointed the guardian ad litem to bring the action above referred to, pursuant to the prayer of the foregoing petitioner. [Signature.]

[Date.]

County of ———, ss.:

On this ——— day of ——— 19—, before me came ———, to me

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[66] Code Civ. Proc. § 470.

[67] Rule 49 of the General Rules of Practice.

[68] Code Civ. Proc. § 472.

[69] Or the petition may be to a judge of the court or a county judge, except in a partition suit.

[70] If the infant is under fourteen the petition should be by general guardian or a relative or friend.

known to be the individual described in and who executed the within Consent, and acknowledged that ——— executed the same.

———,
Notary Public ——— County.

—— Affidavit of proposed guardian.

C. D., being duly sworn, says that he resides at ———;[71] that he is fully competent to understand and protect the rights of the infant above named, and has no interest adverse to that of the infant, and is not connected in business with the attorney or counsel of the adverse party;[72] that he is of sufficient ability to answer to said infant for any damage which may be sustained by his negligence or misconduct in the prosecution of the suit, and is worth the sum of ——— dollars, over and above all the debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution; that he owns property which consists of ———.[73]

[Jurat.] [Signature.]

§ 84. Time for appointment.

The guardian should be appointed before the issuance of summons, but where defendant does not discover that plaintiff is an infant and that no guardian ad litem has been appointed, until the trial, defendant's motion for a non suit may be denied and a guardian ad litem appointed nunc pro tunc as of a date prior to the service of summons,[74] and it has been held that where it appears on the trial that the guardian ad litem was not regularly appointed, a new guardian may be appointed and the trial proceed.[75]

§ 85. Pleadings and proof of appointment.

In an action by a guardian ad litem, the complaint must not

[71] Give state, county, city, and street number.

[72] This clause follows the language of rule 49 of General Rules of Practice.

[73] Rule 49 of General Rules of Practice requires that the facts in respect to the financial ability must be shown in the affidavit.

[74] Rima v. Rossie Iron Works, 47 Hun, 153, 14 State Rep. 639, which refuses to follow Imhoff v. Wurtz, 9 Civ. Proc. R. (Browne) 48, which held that plaintiff could not be allowed to appoint a guardian ad litem on the trial when defendant discovered, on cross-examination of plaintiff, that she was an infant.

[75] Hill v. Board of Water & Sewer Com'rs, 60 State Rep. 20; Wolford v. Oakley, 43 How. Pr. 118.

only describe the guardian as a guardian ad litem, but must also specifically show his due appointment,[76] but it is not necessary to prove at the trial the appointment, unless defendant has objected that no guardian has been appointed.[77]

§ 86. Manner of raising objection.

The objection that an infant appears as plaintiff, without a guardian ad litem, may be taken by answer or demurrer or by motion to set aside the summons and complaint.[78]

—— **Waiver of objections.** The objection that an action was brought in the name of the guardian ad litem, instead of in the name of the infant by a guardian, is waived, where not taken advantage of by demurrer or answer,[79] as is the objection that the action is prosecuted by an infant without a guardian,[80] and the same rule applies where there is an irregularity in the appointment of a guardian ad litem,[81] though not where defendant was in ignorance of the facts.[82] So the Code provides that in a court of record where a verdict, report or decision has been rendered, the judgment shall not be stayed, nor shall any judgment of a court of record be impaired or affected by reason of the appearance of an infant party, by attorney, if the verdict, report, decision or judgment is in his favor.[83]

§ 87. Liability for costs.

A person appointed guardian ad litem for a plaintiff for the purpose of an action, is responsible for the costs thereof, except where such infant prosecutes as a poor person, in which

[76] Hulbert v. Young, 13 How. Pr. 413; Stanley v. Chappell, 8 Cow. 235; Grantman v. Thrall, 44 Barb. 173.

[77] Strong v. Jenkins, 39 State Rep. 409, 21 Civ. Proc. R. (Browne) 9.

[78] Freyberg v. Pelerin, 24 How. Pr. 202; Wolford v. Oakley, Sheld. 261.

[79] Spooner v. Delaware, L. & W. R. Co., 115 N. Y. 22.

[80] Parks v. Parks, 19 Abb. Pr. 161.

[81] Fellows v. Niver, 18 Wend. 563.

[82] Wolford v. Oakley, 43 How. Pr. 118.

[83] Code Civ. Proc. § 721, subd. 7.

case, security for costs shall not be required.[84] A judgment for costs should be entered in form against the plaintiff, but may be enforced by attachment against the guardian without previous demand.[85] Payment of such costs may be enforced, by execution or otherwise, against the guardian ad litem, in like manner as if he was the plaintiff,[86] and hence may be enforced by attachment against the guardian ad litem, as a matter of course and of legal right,[87] notwithstanding his poverty.[88] But where the infant assumed the management of the suit on arriving at his majority, the guardian ad litem is not liable for the costs.[89] A second guardian appointed nunc pro tunc, after issue joined, will be, it seems, liable for the costs.[90] Though the guardian is responsible for costs, he cannot be required to file security therefor.[91]

§ 88. Effect of failure to appoint.

The failure to appoint a guardian ad litem for an infant plaintiff is simply an irregularity and does not deprive the court of jurisdiction.[92] The defect is cured by verdict,[93] or by plaintiff attaining his majority before trial or before objection by defendant.[94]

84 Code Civ. Proc. § 469. Right of infant to sue as poor person will be treated of in volume 2.

85 Schoen v. Schlessinger, 57 How. Pr. 490.

86 Code Civ. Proc. § 3249; Miller v. Woodhead, 17 Civ. Proc. R. (Browne) 104.

87 Wice v. Commercial Fire Ins. Co., 8 Daly, 70; Schoen v. Schlessinger, 57 How. Pr. 490, 7 Abb. N. C. 399.

88 Grantman v. Thrall, 31 How. Pr. 464.

89 Sparmann v. Keim, 6 Abb. N. C. 353.

90 Wolford v. Oakley, 43 How. Pr. 118.

91 Steinberg v. Manhattan Ry. Co., 46 Super. Ct. (14 J. & S.) 216; Wice v. Commercial Fire Ins. Co., 8 Daly, 70.

92 Drischler v. Van Den Henden, 49 Super. Ct. (17 J. & S.) 508; Rima v. Rossie Iron Works, 120 N. Y. 433; Wilkiming v. Schmale, 1 Hilt. 263; Carr v. Huff, 57 Hun, 18, 32 State Rep. 26.

93 Schemerhorn v. Jenkins, 7 Johns. 373.

94 Rutter v. Puckhofer, 22 Super. Ct. (9 Bosw.) 638; Smart v. Haring, 14 Hun, 276; Sims v. New York College of Dentistry, 35 Hun, 344.

§ 89. Rules applicable to guardians ad litem in general.

Questions which pertain equally well to all guardians ad litem, whether for a plaintiff or a defendant, such as who may be appointed guardian, security, powers, duties and liabilities, compensation, etc., will be discussed in a subsequent chapter dealing with appointment of a guardian ad litem for a defendant.

CHAPTER III.

COURTS AND THEIR OFFICERS.

ART. I. DEFINITION OF COURT.

§ 90. In general.

Courts are established in civilized society to administer, in a judicial manner, in proper instances, the appropriate remedies which the law prescribes for the infraction of legal or equitable rights. The word "court" is derived from the Latin cohors, cohortis, or chors, chortis, meaning an inclosure or inclosed place, and it still retains this meaning in one of the senses in which it is commonly employed. In connection with jurisprudence, the word ordinarily signifies an organization, created by public authority, and vested by law with the power to hear and decide causes according to legally established forms, at times and places appointed by law. A court has also been defined as the presence of a sufficient number of the members of a body in the government, to which the public administration of justice is delegated, regularly convened in an authorized place at an appointed time, engaged in the full and regular performance of its functions;[1] also as the persons officially assembled under authority of law at the appropriate time and place for the administration of justice; an official assembly, legally met together for the transaction of judicial business; a judge or judges sitting for the hearing or trial of causes.[2]

§ 91. Idea of place and time as controlling elements.

It may, therefore, be observed that the idea of the Latin word

[1] Cyc. Law Dict.
[2] Webster's Dict.
A court martial is a court. People ex rel. Garling v. Van Allen, 55 N. Y. 31.

from which the word "court" is derived, namely, that of place, is still subsistent as a component element in the conception of a court in the sense in which it is here used, and so prominent is that idea in the view of Mr. Justice Blackstone that he is led to adopt, as the definition of a court, that it is "a place where justice is judicially administered."[3] While, however, the idea of place is a prominent and essential element in the true conception of a court as an abstract entity, and should be enunciated in any definition of a court, still it is not the most prominent and essential, as the learned commentator seemingly implies. Indeed, the idea of time is equally as prominent and essential as that of place, but, for the sake of accuracy, neither should be made to predominate over what is the central idea, namely, that of the organization or body itself. In this connection, it has been well said, by way of criticism of the learned commentator's definition, that "a court is a tribunal rather than a place."

§ 92. Court not in session is still a court.

Some of the foregoing definitions may also be justly criticized as allowing the inference that, unless the judges are convened, or, in other words, unless the court is in session, the court is not in existence. This is manifestly erroneous. The truth is that a legally established and organized court is as truly in existence when not in session as when in session, in vacation as well as in term; that is to say, a court does not come into being when it convenes, and pass out of existence when it adjourns. It comes into existence when it is legally established and organized, and ceases to exist when it is legally abolished.

§ 92a. "Court" as synonymous with "judges."

The term "court" is also used to signify the judge or judges themselves, when duly convened, in contradistinction from the jury, and also in contradistinction from the judge or judges at chambers or when not convened as a court. However, an individual holding a judicial office is not a court.[4]

[3] 3 Bl. Comm. 23; Co. Litt. 58.

[4] People ex rel. Eckerson v. Board of Trustees of Village of Haver-

ART. II. CLASSIFICATION OF COURTS.

§ 93. Courts created by constitution as distinguished from courts created by legislature.

The courts of this state are divided by the constitution[5] into two distinct classes. In the one class are placed certain courts established by the constitution itself, with the jurisdiction to be exercised by them prescribed; in the other class, are included courts recognized as having been created by legislative enactment, and the existence of which depends on such laws, and provision is made for the creation of other inferior local courts by the legislature subject only to the limitation that no inferior local court to be thereafter created shall be a court of record or have equity jurisdiction or any greater jurisdiction in other respects than is conferred on county courts.[6] The latter class of courts are subject to legislative control, and hence may be abolished by the legislature.[7] Such provisions of the constitution of 1894 curtailed the power of the legislature to establish local courts. Under the constitution of 1846 the legislature had power to establish courts in addition to those expressly provided for by the constitution, and to give such courts unlimited jurisdiction in law and equity; and several courts of record established by the legislature are in existence, one of which is the city court of New York. It was not the intention of the constitution to abolish those courts or to raise any question as to their continuance.[8]

straw, 151 N. Y. 75. But see case of the Twelve Commitments, 19 Abb. Pr. 394.

[5] Const. 1894, art. 6.

[6] Const. 1894, art. 6, § 18; Koch v. City of New York, 5 App. Div. 276.

[7] Koch v. City of New York, 5 App. Div. 276.

[8] Koch v. City of New York, 5 App. Div. 276.

But the "local inferior courts" which the legislature may create, does not include courts in place of those specifically named,[9] nor courts having jurisdiction over, and elected in, a territory not constituting a "state" subdivision, such as a congressional district.[10]

§ 94. Courts of general and of inferior jurisdiction.

Courts are often spoken of either as courts of general jurisdiction, or as courts of limited or special jurisdiction, but no precise definition has been laid down to determine to which class a particular court belongs. It must be conceded that in order that a court be one of general jurisdiction, it must be a court of record, and that the mere fact that the judgments or orders of such court are subject to review by a higher court, does not render it an inferior court. General jurisdiction is defined as a jurisdiction which is not, within the limits of the judicial power of the sovereign creating it, limited as to nature of subject matter, amount in controversy, or character of party, —the nature of the jurisdiction and not the territorial extent being the test.[11] In one case the rule has been laid down that to constitute a court a superior court as to any class of actions, its jurisdiction of such actions must be unconditional so that the only thing essential to enable the court to take cognizance of them is the acquisition of jurisdiction of the persons of the parties.[12]

County courts are courts of record, and proceed according to the course of the common law, each having a clerk and a seal. Although their jurisdiction is limited and prescribed by statute, their practice is not, any more than that of the supreme court; but they proceed according to the course of the common law, and are governed by the same rules and practice. Surrogates' courts have been repeatedly held to be inferior courts and they are obviously so. For although they are courts of record they have no common law powers, and do not proceed

[9] People ex rel. Burby v. Howland, 17 App. Div. 165; compare In re Schultes, 33 App. Div. 524.

[10] People v. Dooley, 69 App. Div. 512.

[11] Cyc. Law Dict. 408.

[12] Simons v. DeBare, 17 Super. Ct. (4 Bosw.) 547, 8 Abb. Pr. 269.

according to the course of the common law, but according to the statute, like a justice's court, which has been said to be the true distinction between superior and inferior courts which are in any legal sense courts of record. County courts are courts of general jurisdiction as to kinds and classes of civil actions, and are in no respect limited, except by the amount of the claim and the non-residence of the defendants in the county, or some of them, where the action is commenced. The question is not whether the court is inferior or superior to some other court, but whether it is inferior in the sense that everything is required to be specifically certified upon its records; and if it is not so, its judgments may be attacked and avoided collaterally.[13]

The district and circuit courts of the United States, though of limited jurisdiction, are not inferior courts, in the technical sense of the term.[14]

A court whose jurisdiction of every action, of the action itself, depends either upon the place where the defendants reside, or the fact that they are "personally served with the summons" within a designated locality smaller than a county, is an inferior court, within the common-law meaning of that term. If a court has a general jurisdiction of an enumerated class of actions, without reference to the place where they arose, or the parties to them resided, or to the amount sought to be recovered, and is a court of record, and proceeds according to the general course of the common law, it may be, quoad hoc, a superior court. So where a city court has no jurisdiction of the subject matter of the suit—of the action itself—unless the defendant resides within the city or was personally served with the summons within that city, it is an inferior court, within the common-law meaning of that phrase.[15]

[13] Kundolf v. Thalheimer, 17 Barb. 506.

Contra,—Frees v. Ford, 6 N. Y. (2 Seld.) 176, which was decided before the supreme court case but not reported in time to be considered.

[14] Ruckman v. Cowell, 1 N. Y. (1 Comst.) 505.

[15] Simons v. DeBare, 17 Super. Ct. (4 Bosw.) 547, 8 Abb. Pr. 269.

§ 95. Courts of record and courts not of record.

The fact that there is no well defined line distinguishing courts of record from courts not of record, rendered it necessary that the Code should specifically designate the courts of record and the courts not of record, since many of the provisions of the constitution and of the Code are stated to be applicable only to courts of record, or, on the other hand, to courts not of record.

—— **Courts of record under the Code.** Each of the following courts of the state is a court of record:

1. The court for the trial of impeachments.
2. The court of appeals.
3. The appellate division of the supreme court in each department.
4. The supreme court.
5. The court of general sessions of the peace in and for the city and county of New York.
6. The city court of Long Island City.
7. The city court of Yonkers.
8. A county court in each county, except New York.
9. The city court of the city of New York.
10. The mayor's court of the city of Hudson.
11. The recorder's court of the city of Utica.
12. The recorder's court of the city of Oswego.
13. The justices' court of the city of Albany.
14. A surrogate's court in each county.
15. The court of claims.[16]

—— **Courts not of record under the Code.** Each of the following courts of the state is a court not of record:

1. Courts of justices of the peace in each town, and in certain cities and villages.
2. Courts of special sessions of the peace in each town, and in certain cities and villages.
3. The district courts in the city of New York.
4. The police courts in certain cities and villages.
5. The justices' court of the city of Troy.
6. The municipal court of the city of Rochester.

[16] Code Civ. Proc. § 2.

7. The municipal court of the city of Syracuse.
8. The municipal court of the city of Buffalo.[17]

—— **Common law distinction.** This classification of courts of record and courts not of record is arbitrary, and does not follow the common law distinction. A court of record was a court where the acts and proceedings were enrolled in parchment for a perpetual memorial testimony,[18] but it is said that the mere fact that a permanent record is kept, does not, in modern law, stamp the character of the court, since many courts of limited or special jurisdiction are obliged to keep records, and yet are held to be courts not of record.[19] The possession of the right to fine and imprison for contempt was formerly considered as furnishing decisive evidence that a court was a court of record,[20] but every court of record does not possess this power.[21]

ART. III. GENERAL RULES RELATING TO COURTS.

(A) PROCEEDINGS ON SUNDAYS AND HOLIDAYS.

(B) RULES OF COURT.

(C) TERMS OF COURT.

17 Code Civ. Proc. § 3.
18 3 Bl. Comm. 24.
19 Cyc. Law Dict. 222.
20 Co. Litt. 117b, 260a.
21 3 Sharswood's Bl. Comm. 25, note.

(A) PROCEEDINGS ON SUNDAYS AND HOLIDAYS.

§ 96. Common law rule.

At the common law, judicial proceedings were prohibited on Sunday, which was said to be dies non juridicus, and judicial acts performed on that day were void.[22] Holidays, however, were days on which judicial acts could be performed.[23]

22 Merritt v. Earle, 31 Barb. 38; Story v. Elliot, 8 Cow. 27.

23 The civilians employed the Latin term "dies juridicus," to denote the days for legal purposes or judicial proceedings and the term "dies non juridicus" was used by them to designate the days in which judicial proceedings were prohibited, but with the exception of Sunday we have no such days and there is no reason for their

§ 97. Code rule as to Sundays.

The Code provides that court shall not be opened, or transact any business on Sunday, except to receive a verdict or discharge a jury. An adjournment of a court on Saturday, unless made after a cause has been committed to a jury, must be to some other day than Sunday. But this section does not prevent the granting of an injunction order by a justice of the supreme court when in his judgment it is necessary to prevent irremediable injury or the service of a summons with or without a complaint if accompanied by an injunction order and an order of such justice permitting service on that day.[24] A writ of habeas corpus may be issued and served on Sunday, but cannot be made returnable on that day.[25] A sale upon foreclosure by advertisement must be "on a day other than Sunday or a public holiday."[26]

—— **What are judicial acts.** Service and return of process is invalid if made on Sunday, except where the summons is accompanied by an injunction order and an order of a justice of the supreme court permitting service on that day,[27] but the defect in making process returnable on Sunday, may be waived.[28] A notice of motion cannot be served on Sunday.[29] Continuing a cause from Saturday until Monday is not keeping a court open on the Sabbath.[30] It has been held, by implication, that additional instructions should not be given to the jury on Sunday, where the cause has been submitted to them on Saturday, but that the irregularity is one which is waived if

augmentation. The avenues of approach to the courts should be open on all secular days, and great inconvenience and positive loss and injury will result from their diminution. We cannot therefore impute to the legislature an intention to diminish the number of judicial days without unequivocal language expressive of such a design. Didsbury v. Van Tassell, 31 State Rep. 204.

24 Code Civ. Proc. § 6.

25 Code Civ. Proc. § 2015.

26 Code Civ. Proc. § 2393.

27 Code Civ. Proc. § 6; Van Vechten v. Paddock, 12 Johns. 178.

28 Wright v. Jeffrey, 5 Cow. 15.

29 Field v. Park, 20 Johns. 140.

30 Vanderwerker v. People, 5 Wend. 530.

the parties do not object.[31] It would seem, though, that the better rule is that additional instructions may be given on Sunday, as a matter of necessity, and it has been so held in other states.[32] A judgment rendered on Sunday is void,[33] and does not prevent a valid entry of judgment on a subsequent day.[34] An award has been held to be a judicial act, so as to be invalid where made and published on Sunday,[35] though where all the parties were Jews, an award made on Sunday, in pursuance of a trial on that day, was held valid, where it was dated and delivered on the following day.[36] An inquisition to assess damages is invalid where issued on Sunday.[37]

§ 98. Holidays.

The statute provides that the term holiday shall include New Year's day, Lincoln's birthday, Washington's birthday, Memorial day, the Fourth of July, Labor day, and Christmas day, and if either of such days is Sunday, the next day thereafter, and also general election day and Thanksgiving day. The term half-holiday includes the period from noon to midnight of each Saturday, which is not a holiday. Such days and half-days, shall be considered as the first day of the week, commonly called Sunday, and as public holidays or half-holidays, for all purposes whatsoever, as regards the transaction of business in the public offices of this state or counties of this state.[38] It has been held under this statute that a court is not a public office within the meaning of the provision as to Saturday half-holidays,[39] and that process may be served,[40] or returned,[41] or

31 Roberts v. Bower, 5 Hun, 558.

32 People v. Odell, 1 Dak. 197; Jones v. Johnson, 61 Ind. 257.

33 Allen v. Godfrey, 44 N. Y. 433; Hoghtaling v. Osborn, 15 Johns. 119.

34 Allen v. Godfrey, 44 N. Y. 433.

35 Story v. Elliot, 8 Cow. 27.

36 Isaacs v. Beth Hamedash Soc., 1 Hilt. 469.

37 Butler v. Kelsey, 15 Johns. 177.

38 Laws 1892, c. 677, § 24, as amended L. 1897, c. 614.

39 Carey v. Reilly, 20 Misc. 610; People v. Kearney (criminal case), 47 Hun, 129.

40 Didsbury v. Van Tassell, 56 Hun, 423; Slater v. Jackson, 25 Misc. 783.

an order served, on a day designated as a legal holiday.[42] Laws 1842, c. 130, tit. 1, § 5, as amended by Laws 1847, c. 240, § 2, provided that no court can be opened within the state on any "general" election day to transact business, except for the purpose of receiving a verdict or discharging a jury, and for the exercise by a single magistrate of certain jurisdiction in criminal cases. It has been held thereunder that a voter who is refused the right to vote cannot resort on election day to any court for relief by mandamus or otherwise,[43] but that a judicial sale was not business of the court, within the act,[44] and also that the statute does not prevent the entry of judgment or the transaction of other civil business, not requiring the attendance of the parties, attorneys, witnesses, or officers.[45] This statute has been repealed.[46]

(B) RULES OF COURT.

§ 99. Establishment—For court of appeals.

The court of appeals act provides that such court may from time to time make, alter and amend rules not inconsistent with the constitution or statutes of the state, regulating the practice and proceedings in the court, and the admission of attorneys to practice in all the courts of record of the state.[47]

——**For other courts of record.** The Code of Civil Procedure provided that the general term justices of the supreme court and the chief judges of the superior city courts, should meet in the city of Albany, in October, 1877, and every second year thereafter, for the purpose of establishing rules of practice.[48] In pursuance of this provision, the rules of 1877, 1880, 1884 and 1888 were adopted. Rules had been previously adopted, for the first time in 1849, under a like provision embodied in the Code of Procedure. When the constitution of

[41] Berthold v. Wallach, 14 Misc. 55.
[42] Matter of Bornemann, 6 App. Div. 524.
[43] People ex rel. Lower v. Donovan, 135 N. Y. 76.
[44] King v. Platt, 37 N. Y. 155.
[45] Rice v. Mead, 22 How. Pr. 445.
[46] L. 1892, c. 680, § 168, p. 1655.
[47] Code Civ. Proc. § 193.
[48] Code Civ. Proc. § 17.

1894 was adopted, the Code of Civil Procedure was amended to read as follows: "The justices assigned to the appellate division of the supreme court shall meet in convention at the capitol in the city of Albany, on the fourth Tuesday in October, eighteen hundred and ninety-five, and at least every second year thereafter. They must also meet from time to time at the same place whenever called together by at least five of said justices at a time to be fixed in the said call. * * * The convention must establish rules of practice not inconsistent with this act which shall be binding upon all the courts in the state and all the judges and justices thereof, except the court for the trial of impeachments and the court of appeals. A majority of the members of such convention shall constitute a quorum. The rules thus established are styled in this act 'the general rules of practice.' "[49] In pursuance of this provision, the rules of 1895, 1897 and 1899, were adopted.

§ 100. Publication.

A general rule of practice, or a general rule or order of the court of appeals, does not take effect, until it has been published in the newspaper published at Albany, in which legal notices are required by law to be published, once in each week for three successive weeks.[50]

§ 101. Validity of rules.

Rules of court cannot nullify or contravene statutes,[51] but they may establish a rule in conflict with the previous decisions of the court regulating practice.[52] So the power of the court to make general rules does not authorize rules taking away the right to be heard upon an order equivalent to a final adjudication, e. g. an order striking out a pleading and precluding a party from any defense.[53]

[49] Code Civ. Proc. § 17, as am'd by L. 1895, c. 946.

[50] Code Civ. Proc. § 18.

[51] French v. Powers, 80 N. Y. 146; Glenney v. Stedwell, 64 N. Y. 120; Gormerly v. McGlynn, 84 N. Y. 284; People v. Bruff, 9 Abb. N. C. 153; Palmer v. Phenix Ins. Co., 22 Hun, 224.

[52] Havemeyer v. Ingersoll, 12 Abb. Pr., N. S., 301.

[53] Rice v. Ehele, 55 N. Y. 518.

§ 102. Construction.

A rule of court, as construed by the court for which it was made, will not ordinarily be construed differently by a court of review or another court.[54]

§ 103. Force and effect.

Whether or not courts may suspend the rules or except a particular case from their operation, or allow an act to be done nunc pro tunc to comply with the rules, is not entirely clear. It has been said that while a failure to comply with the rules which is merely directory in its provisions, may be obviated by allowing the act required to be performed, to be done nunc pro tunc, this is not so with reference to mandatory provisions.[55] On the one hand, the courts have stated that rules of court, being made under special statutory authority, have the same force and effect on procedure as statutes.[56] On the other hand, it has been held that the court may deviate from the general rules whenever, in its judgment, a proper case is presented,[57] and that the supreme court may overlook or relieve against a violation of, or a noncompliance with, them, and can permit an act to be done after the time prescribed by such rules.[58]

§ 104. Amendment of rules.

Amendments of rules of court are analogous to the amendments of statutes and should receive the same construction. The rule of statutory construction that when a statute is amended by enacting that it "is amended so as to read as follows," and then incorporating the changes and additions, with so much of the former statute as is retained, the part which remains unchanged is to be considered as having been

[54] Matter of Argus Co., 138 N. Y. 557; Evans v. Backer, 101 N. Y. 289.

[55] Matter of Moore, 108 N. Y. 280.

[56] Ives v. Ives, 80 Hun, 136, 61 State Rep. 657; People ex rel. City of New York v. Nichols, 18 Hun, 530.

[57] Clark v. Brooks, 26 How. Pr. 285.

[58] Martine v. Lowenstein, 68 N. Y. 456.

continued the law from the time of its original enactment, applies to amendments of the rules of the court.[59]

§ 105. Further rules.

The appellate division in each department of the supreme court, and the various courts of record, may make such further rules in regard to the transaction of business before them respectively, not inconsistent with the general rules, as they in their discretion may deem necessary.[60]

§ 106. Practice when not covered by rules or statutes.

Rule 84 of the General Rules of Practice provides that in cases where no provision is made by statute or by such rules the proceedings shall be according to the customary practice as it formerly existed in the court of chancery or supreme court, in cases not provided for by statute or by the written rules of those courts.

(C) TERMS OF COURT.

§ 107. Definition and history.

A term of court is the space of time during which a court holds a session, i. e., the stated periods during which courts sit for the dispatch of business. Sometimes the term is a monthly, at others it is a quarterly, period, according to the constitution of the court.[61] In the common law courts, the regular terms were derived from canonical prohibitions, which "exempted certain holy seasons from the turmoil of forensic litigations," such as the time of Advent and Christmas, giving rise to the winter vacation; the time of Lent and Easter, giving rise to that of the spring; the time of Pentecost, from which was derived the third vacation. There was, finally, the long vacation between mid-summer and Michaelmas, for the season of harvest. In this way, there came to be four well known

[59] Matter of Warde, 154 N. Y. 342.
[60] Rule 83 of General Rules of Practice.
[61] Cyc. Law Dict. 902.
For terms of particular courts, see post, §§ 156, 173-177, 184, 200, 218.

terms of court: St. Hilary, Easter, Holy Trinity and St. Michael. Strict judicial business could only be transacted at these terms, though, after a time, many incidental matters were transacted out of court. The terms of court, thus, have a purely historical character, and there is no reason in the nature of judicial business, why they should exist nor why such business should be confined to them. In equity courts, no such rules ever prevailed. A chancellor could do business out of term as well as in term. Under our present law, though statutes provide for regular terms of equity courts, it is well settled that the power to do business out of term still continues to a certain extent.[62]

§ 108. Difference between terms of court and special terms.

When the statute speaks of terms of court, the terms constituted by law are meant, and not special motion days, to which have been given the designation of special terms.[63]

§ 109. Relation back of acts done during term.

Every judicial act done at a sitting or term of court is to be regarded as done on the first day of the term.[64]

§ 110. No terms of court in some courts.

In some courts, such as the surrogate's court, there are no stated terms of court, but the court is always open and its proceedings are continued from day to day.[65]

§ 111. Continuation and adjournment of term.

Where the trial or hearing of an issue of fact, joined in an action or special proceeding, has been commenced at a term of a court of record, it may, notwithstanding the expiration of the time appointed for the term to continue, be continued to the completion thereof; including, if the cause is tried by a

[62] Brown v. Snell, 57 N. Y. 286.
[63] Smith v. Cutler, 10 Wend. 590.
[64] Manchester v. Herrington, 10 N. Y. (6 Seld.) 164.
[65] Western v. Romaine, 1 Bradf. Surr. 37.

jury, all proceedings taken therein until the actual discharge of the jury; or, if it is tried by the court without a jury, until it is finally submitted for a decision upon the merits.[66] Any term of a court of record may be adjourned from day to day, or to a specified future day, by an entry in the minutes. Jurors may be drawn for and notified to attend a term so adjourned, and causes may be noticed for trial thereat, as if it was held by original appointment. Any judge of the court may so adjourn a term thereof, in the absence of a sufficient number of judges to hold the term.[67] A court which has been regularly convened, continues open until actually adjourned. An order for its continuance is not essential.[68] Where an action was commenced in the supreme court before a justice and continued until after the time when the term of office of such justice expired, but where, on his re-election, he commenced a new term, and the trial proceeded without objection, there was no error.[69]

—— **In absence of judge.** If a judge, authorized to hold a term of court, does not come to the place, where the term is appointed to be held, before four o'clock in the afternoon of the day so appointed, the sheriff or clerk must then open the term, and forthwith adjourn it to nine o'clock in the morning of the next day. If such a judge attends by four o'clock in the afternoon of the second day, he must open the term; otherwise the sheriff or the clerk must adjourn it without day.[70]

—— **On written direction of judge.** If, before four o'clock of the second day, the sheriff or the clerk receives from a judge, authorized to hold the term, a written direction to adjourn the term to a future day certain, he must adjourn it

[66] Code Civ. Proc. § 45.

[67] Code Civ. Proc. § 34.

[68] People v. Central City Bank, 53 Barb. 412, 35 How. Pr. 428; French v. Seamans, 21 Misc. 722.

[69] Kelly v. Christal, 16 Hun, 242.

[70] Code Civ. Proc. § 35, as am'd L. 1877, c. 416; see People v. Sullivan, 115 N. Y. 185, where it was held, in a criminal case, that a court could legally convene, on the day after the day to which it had been adjourned.

accordingly, instead of adjourning it sine die. The direction must be entered in the minutes as an order.[71]

§ 112. Effect of adjournment or change of term.

When a term of court fails or is adjourned, or the time or place of holding the same is changed, an action, special proceeding, writ, process, recognizance, or other proceeding, returnable, or to be heard or tried, at that term, is not abated, discontinued, or rendered void thereby; but all persons are bound to appear, and all proceedings must be had, at the time and place to which the term is adjourned or changed, or, if it fails, at the next term, with like effect as if the term was held, as originally appointed.[72]

§ 113. Place for holding court.

Court must be held at the court house, except where other provision is made. It was held under the old Code that a county court can be held only at the court house, so that proceedings conducted at the office of the county judge are invalid,[73] but the Code of Civil Procedure, § 355, permits the county judge to adjourn a term to any place within the county for the hearing and decision of motions and appeals, and trials and other proceedings without a jury. So contested motions requiring notice cannot be brought on at a special term adjourned by the justice holding it to his chambers, unless by the consent of all the parties,[74] but a special term of the supreme court may be adjourned to the chambers of any justice of the court residing within the judicial district by an entry in the minutes; and then adjourned from time to time, as the justice holding the same directs.[74a]

—— **Change of place.** The place of holding court may be changed as follows:

[71] Code Civ. Proc. § 36.
[72] Code Civ. Proc. § 44.
[73] Bennett v. Cooper, 57 Barb. 642.
[74] Matter of Wadley, 29 Hun, 12.
[74a] Code Civ. Proc. § 239.

1. Where the parties agree that the action or special proceeding shall be tried elsewhere than at the courthouse;[75]

2. Where the governor deems it necessary, by reason of war, pestilence or other public calamity, or the danger thereof, that the next ensuing term of any court of record, appointed to be held elsewhere than in the city of New York, should be held at a different place;[76]

3. Where a malignant, contagious or epidemic disease exists at the place where a term of court of record is appointed to be held, the chief or presiding judge may direct the term to be held at another place within the district;[77]

4. Where, during the actual session of a term, the judge, or a majority of the judges, holding the same, deem it inexpedient by reason of war, pestilence, or other public calamity, or the danger thereof, or for want of suitable accommodations, that the term should be continued;[78]

5. Where the mayor, or in case of his absence or other disability, the recorder, of the city of New York, deems it necessary that the next ensuing term of any court, other than the court of appeals, appointed to be held in the city of New York, that some other place should be selected because of war, pestilence or other public calamity or the danger thereof, or the destruction or injury of the building, or the want of suitable accommodations;[79]

6. Where the building established as a court house in a county is destroyed, or is, for any cause, unsafe, inconvenient, or unfit, for holding court therein.[80]

(D) DECISIONS AND RULES OF DECISION.

§§ 114, 115. Necessity for written decisions and time for filing.

The necessity that a written decision be filed, in a trial court,

[75] Code Civ. Proc. § 37.

This section implies that the several matters to which the section relates, cannot be brought on elsewhere than at the court house, except by consent. Matter of Wadley, 29 Hun, 12.

[76] Code Civ. Proc. § 38.

[77] Code Civ. Proc. § 40.

[78] Code Civ. Proc. § 41.

[79] Code Civ. Proc. § 42.

[80] Code Civ. Proc. § 43.

and the effect of failing to file within the statutory time, will be treated of in the chapter relating to trials.

§ 116. Rule of stare decisis.

The rule of stare decisis is that when a court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle in future cases where the facts are substantially the same. But this doctrine does not apply where the principle of law has been declared by an inferior court.[82]

§ 117. General rules as to effect of decisions.

As a general rule, an inferior court should not disregard the decisions of the court of last resort, but must give them full effect, whatever their views may be as to the correctness or wisdom of such decisions. But when that court departs from its own decisions, and leaves it uncertain what its views are upon a question of law, the court having the case in hand, should give effect to the latest expression of the views of its own court, leaving the court of last resort to determine which is the sounder, the earlier or the later conclusions.[83] A further exception to the general rule arises in case of an exceptional, ill-considered, and clearly erroneous decision of the court of last resort, which does not, as a precedent, necessarily control the subsequent determination of a subordinate court of general jurisdiction.[84] Where several questions are decided, the fact that the decision of one of them would have determined the appeal does not render the decision on the others dictum,[85] and,

[82] Moore v. City of Albany, 98 N. Y. 396.

[83] Costello v. Syracuse, B. & N. Y. R. Co., 65 Barb. 92.

[84] Wayne County Sav. Bank v. Low, 6 Abb. N. C. 76 (court of appeals decision criticised); Reynolds v. Davis, 7 Super. Ct. (5 Sandf.) 267. See, also, Overheiser v. Morehouse, 2 How. Pr., N. S., 257, 16 Abb. N. C. 208, 8 Civ. Proc. R. (Browne) 11.

[85] James v. Patten, 6 N. Y. (2 Seld.) 9; Smith v. Rentz, 131 N. Y. 169.

As to what is dicta, see Matter of Klock, 30 App. Div. 24; People ex rel. McDonald v. Leubischer, 23 Misc. 495, 27 Civ. Proc. R. (Kerr) 296.

where the majority of the appellate court agrees to a proposition, the court below is bound, though the decision is based on several grounds, to no one of which does a majority concur.[86] A point essential to the decision will be presumed to have been duly considered, and that all that could be urged for or against it was presented to the court, unless the report shows otherwise.[87] A decision assuming jurisdiction without discussion of the cases in which jurisdiction has previously been expressly denied, it seems, will not be regarded as a precedent,[88] but the fact that a particular point has not been raised in a long series of decisions involving it, is strong evidence that the point is without merit.[89]

§ 118. Decisions of court of appeals.

A decision by the court of appeals becomes the law of the state,[90] and should be followed in preference to an earlier decision of the commission of appeals,[91] or a prior decision to the contrary effect in the case at bar,[92] and the pendency of an appeal to the United States supreme court does not impair the binding effect of the decision.[93] The commission of appeals were held, however, to be not bound by dicta of the court of appeals.[94]

§ 119. Decisions of supreme court.

At first, a decision of a general term of the supreme court controlled in the district in which it was rendered, but the question was regarded in the other districts as an open one until decided in the court of appeals, but the rule was early

86 Oakley v. Aspinwall, 8 Super. Ct. (1 Duer) 1, 10 N. Y. Leg. Obs. 79.
87 Molony v. Dows, 8 Abb. Pr. 316.
88 People v. Clark, 1 Park. Cr. R. 368.
89 Webb v. Rome, W. & O. R. Co., 49 N. Y. 420.
90 Scott v. King, 51 App. Div. 619, 64 N. Y. Supp. 626; Cullen v. Cullen, 23 Misc. 80; Devitt v. Providence Wash. Ins. Co., 61 App. Div. 390.
91 Board Sup'rs of Delaware County v. Foote, 9 Hun, 527.
92 Mechanics' & Traders' Bank of Jersey City v. Dakin, 8 Hun, 431.
93 Rochester & G. V. R. Co. v. Clarke Nat. Bank, 60 Barb. 234.
94 Town of Duanesburgh v. Jenkins, 57 N. Y. 177.

established that decisions of the general term on questions of practice, as well as on other questions, must control in all districts, unless clearly erroneous, until reversed by the court of appeals.[95] The binding effect of a decision of the supreme court is not affected by the fact that the decision has been disapproved of in other states,[96] or that on an appeal to the court of appeals the decision was affirmed by an equally divided court,[97] or because on an intermediate appeal to the court of appeals a member of that court expressed an opinion adverse to that of the supreme court.[98] So a decision of the appellate division is binding on a justice sitting at trial term.[99] But the appellate division has disregarded decisions of its predecessor, the general term,[100] and a county court has considered itself not bound by a general term decision in another department of the supreme court.[101] So when the question to be determined is involved in a maze of legislation, the same weight cannot be given to a decision of the general term as there would be to one involving a pure legal principle. In such a case, it is the duty of the special term, when it sees plainly that statutory provisions have been overlooked, to follow its own clear convictions, stating its reasons therefor respectfully, thus leaving to the general term a review of the subject.[102] So decisions of the supreme courts furnish no precedent for the court of appeals.[103]

§ 120. Decisions of courts of sister states.

The decision of a court of a sister state, where construing a statute of that state, should be followed.[104] However, the de-

[95] Burt v. Powis, 16 How. Pr. 289; Loring v. United States Vulcanized Gutta Percha Belting & Packing Co., 30 Barb. 644; Malam v. Simpson, 12 Abb. Pr. 225, 20 How. Pr. 488; Bentley v. Goodwin, 38 Barb. 633; Hardenburgh v. Crary, 50 Barb. 32.

[96] Head v. Smith, 44 How. Pr. 476.

[97] Birckhead v. Brown, 7 Super. Ct. (5 Sandf.) 134.

[98] Adams v. Bush, 2 Abb. Pr., N. S., 112.

[99] Western Nat. Bank v. Faber, 29 Misc. 467.

[100] Sias v. Rochester Ry. Co., 18 App. Div. 506.

[101] Nichols v. Fanning, 20 Misc. 73.

[102] Overheiser v. Morehouse, 2 How. Pr., N. S., 257, 16 Abb. N. C. 208, 8 Civ. Proc. R. (Browne) 11.

[103] Doolittle v. Supervisors of Broome County, 18 N. Y. 155.

[104] Howe v. Welch, 14 Daly, 80, 3 State Rep. 576, 17 Abb. N. C. 397;

cisions of the courts of the state chartering a corporation are not conclusive as to the interpretation of the charter, in respect to real estate situated here,[105] and the decisions of a state where a contract is made will not be followed as to its interpretation, when to do so would overturn a generally established principle of commercial law,[106] since the decisions of the courts of another state are not binding on rules of common law applicable to commercial transactions.[107]

§ 121. Decisions of state courts in federal courts and vice versa.

The supreme court of the United States will follow the decisions of the state courts in the construction of state statutes and constitution, and the state courts must follow the decisions of the federal courts upon federal questions[108]—but not upon other questions,[109] and the decisions of the supreme court on questions of commercial law.[110] The interpretation of an act of congress by the federal courts should be followed, though the particular case is not of federal cognizance,[111] but the decision of the United States court as to the constitutionality of a statute, under a provision of the federal constitution, is not binding on the state court as to the constitutionality of the act, under a similar provision in the state constitution.[112] A decision of a federal court will not be followed as against the decision

Hoyt v. Thompson, 5 Super. Ct. (3 Sandf.) 416; Leonard v. Columbia Steam Nav. Co., 84 N. Y. 48; Viele v. Wells, 9 Abb. N. C. 277; Campbell v. Campbell, 53 Super. Ct. (21 J. & S.) 299; Savings Ass'n of St. Louis v. O'Brien, 51 Hun, 45, 20 State Rep. 826; Jessup v. Carnegie, 80 N. Y. 441. But the decision of an inferior court of another state should not be followed where in conflict with a decision of our court of appeals. Matter of Robertson's Will, 23 Misc. 450.

105 Boyce v. City of St. Louis, 29 Barb. 650.

106 Faulkner v. Hart, 82 N. Y. 413.

107 Saint Nicholas Bank v. State Nat. Bank, 128 N. Y. 26.

108 Duncomb v. New York, H. & N. R. Co., 84 N. Y. 190; Buffalo German Ins. Co. v. Third Nat. Bank of Buffalo, 29 App. Div. 137.

109 Poole v. Kermit, 37 Super. Ct. (5 J. & S.) 114; Towle v. Forney, 14 N. Y. (4 Kern.) 423.

110 Stoddard v. Long Island R. Co., 7 Super. Ct. (5 Sandf.) 180.

111 York v. Conde, 147 N. Y. 486.

112 People v. Budd, 117 N. Y. 1.

of the court of appeals of New York.[113] So the decisions of the United States courts are not binding as to the right of a common carrier to limit its liability for negligence.[114]

§ 122. Decision on former appeal as law of the case.

The decision on a former appeal is the law of the case on a second trial where the facts are not materially different,[115] and where there has not been an intervening contrary decision by a higher court.[116]

(E) MISCELLANEOUS PROVISIONS.

§ 123. Sittings of court are public.

The sittings of every court must be public, and every citizen may attend the same except that in all proceedings and trials in cases for divorce on account of adultery, seduction, abortion, rape, assault with intent to commit rape, criminal conversation, and bastardy, the court may, in its discretion, exclude therefrom all persons who are not directly interested therein, excepting jurors, witnesses and officers of the court.[117]

§ 124. General powers of courts of record.

Among the many powers possessed by a court of record, are three specifically set forth in the Code as follows: 1. To issue a subpoena, requiring the attendance of a person found in the state, to testify in a cause pending in that court; subject, however, to the limitations, prescribed by law, with respect to the portion of the state, in which the process of a local court of record may be served. 2. To administer an oath to a witness, in the exercise of the powers and duties of the court. 3. To devise and make new process and forms of proceedings, neces-

[113] Devitt v. Providence Wash. Ins. Co., 61 App. Div. 390; Town of Venice v. Breed, 1 Thomp. & C. 130, 65 Barb. 597.

[114] Mynard v. Syracuse, B. & N. Y. R. Co., 71 N. Y. 180.

[115] Cooper v. Smith, 43 Super. Ct. (11 J. & S.) 9; Genet v. Delaware & H. Canal Co., 13 Misc. 409, 69 State Rep. 357.

[116] Patterson v. City of Binghamton, 4 App. Div. 615.

[117] Code Civ. Proc. § 5.

sary to carry into effect the powers and jurisdiction possessed by it.[118]

§ 125. Writs and process.

Except where it is otherwise specially prescribed by law, a writ or other process must be in the name of the people of the state, and each writ, process, record, pleading or other proceeding in a court, or before an officer, must be in the English language, and, unless it is oral, made out on paper or parchment, in a fair, legible character, words at length, and not abbreviated. But the proper and known names of process, and technical words, may be expressed in appropriate language, as now is, and heretofore has been customary; such abbreviations as are now commonly employed in the English language may be used; and numbers may be expressed by Arabic figures, or Roman numerals, in the customary manner.[119]

—— **Teste, return, and filing.** A writ or other process issued out of a court of record, must be tested, except where it is otherwise specially prescribed by law, in the name of a judge of the court, on any day; must be returnable within the time prescribed by law; or, if no time is prescribed by law, within the time fixed by the court, and therein specified for that purpose; and, when returnable, must, together with the return thereto, be filed with the clerk, unless otherwise specially prescribed by law.[120]

—— **Subscription, indorsement, and seals.** A writ or other process, issued out of a court of record, must, before the delivery thereof to an officer to be executed, be subscribed or indorsed with the name of the officer by whom, or by whose direction it was granted, or the attorney for the party, or the person at whose instance it was issued. A writ or other process thus subscribed or indorsed, is not void or voidable, by reason of having no seal or a wrong seal thereon, or of any mistake or omission in the teste thereof, or in the name of the clerk, unless it was issued by special order of the court.[121]

[118] Code Civ. Proc. § 7.

[119] Code Civ. Proc. § 22.

[120] Code Civ. Proc. § 23.

[121] Code Civ. Proc. § 24; Douglas v. Haberstro, 88 N. Y. 611; Ovoronhe v. Terry, 17 Wkly. Dig. 503.

§ 126. Seals of courts.

The seal of the court of appeals, and of each other court of record in the state, is the same as before the Codes. The seal kept by the county clerk of each county is the seal of the supreme court, in that county, and, except in the city and county of New York, of the county court, in that county. A description of each of the seals is required to be deposited and recorded in the office of the secretary of state, and to remain of record.[122] The seal kept by a county clerk is the seal of the county, and must be used by him where he is required to use an official seal.[123] When the seal of a court is so injured that it cannot be conveniently used, the court must cause it to be destroyed; and when the seal of a court is lost or destroyed, the court must cause a new seal to be made, similar in all respects to the former seal, which shall become the seal of the court.[124]

§ 127. Practice where no Code provision or rule of court.

All matters of practice are, in the first instance, in the discretion of the courts in which questions of practice arise, in the absence of statutory provisions or general rules of court. Matters of practice come after a while to be governed absolutely by the custom of the courts; and what is found in every case to have been held by authoritative decisions to be the custom of the courts, becomes the way in which discretion must go.[125] The powers of the courts in so far as derived from immemorial usage, constitute their inherent jurisdiction. Presumptively whatever judicial procedure is essential to enable courts to exercise their functions is authorized.[126] The Code provides that courts shall continue to exercise the jurisdiction and powers vested in them by law, according to the course and practice of the court, except as otherwise prescribed in the Code.[127] Rule 84 of the General

122 Code Civ. Proc. § 27.
123 Code Civ. Proc. § 28.
124 Code Civ. Proc. § 30.
125 Fisher v. Gould, 81 N. Y. 228, 232.
126 McQuigan v. Delaware, L. & W. R. Co., 129 N. Y. 50, 52.
127 Code Civ. Proc. § 4.

Rules of Practice provides that in cases where no provision is made by the statute or by such rules the proceedings shall be according to the customary practice as it formerly existed in the court of chancery or supreme court, in cases not provided for by statute or by the written rules of those courts.

ART. IV. GENERAL RULES RELATING TO JURISDICTION.

§ 128. Definition.

In the whole realm of jurisprudence, no word has been used in so many different senses as has the word "jurisdiction." The following clean cut definitions have been laid down by New York courts: "Jurisdiction, in the strict meaning of the term, as applied to judicial officers and tribunals, means no more than the power lawfully existing to hear and determine a cause. It does not depend upon the ultimate existence of a

good cause of action in the plaintiff in the particular case before the court."[128] "Jurisdiction of the subject matter is power to adjudge concerning the general question involved, and is not dependent upon the state of facts which may appear in a particular case, arising, or which is claimed to have arisen, under that general question."[129] "Jurisdiction does not relate to the right of the parties as between each other, but to the power of the court. The question of its existence is an abstract inquiry not involving the existence of an equity to be enforced nor the right of the plaintiff to avail himself of it if it exists. It precedes those questions, and a decision upholding the jurisdiction of the court is entirely consistent with a denial of any equity either in the plaintiff or in any one else."[130] "The question presented to a court of equity by the objection that the complaining party had a full, adequate and complete remedy at the common law, related to the jurisdiction of the court of equity, and is constantly spoken of in the cases in that way. But so far was it from presenting the question of mere power, that if the objection was neither taken by demurrer, plea nor answer, the court proceeded and gave judgment on the merits, notwithstanding it would have rejected the jurisdiction had the question been raised at the right time. This points to the true line of distinction in the use of the term 'jurisdiction.' The question is properly one of jurisdiction only when a judgment asserting the power of the court would be void and assailable collaterally in every other court. There are, I apprehend, very few cases in which that position could be affirmed in respect to a court possessing general jurisdiction in law and equity, on grounds relating to the subject matter of a controversy."[131]

§ 129. Elements of jurisdiction.

Jurisdiction depends on the subject matter involved and on the parties. The former is spoken of as "jurisdiction of the subject matter," and the latter as "jurisdiction of the per-

[128] People ex rel. Gaynor v. McKane, 78 Hun, 154.
[129] Hunt v. Hunt, 72 N. Y. 217.
[130] People ex rel. Davis v. Sturtevant, 9 N. Y. (5 Seld.) 263.
[131] Bangs v. Duckinfield, 18 N. Y. 592.

son." The one depends upon the constitution and the statutes while the other depends on the acts of the parties. Where the cause of action arises, or the property is situated, within the state, but one or both of the parties are non-residents, the question is as to the jurisdiction of the person. The manner of obtaining jurisdiction of the person, and the necessity of some kind of notice, will be treated of in a subsequent chapter.[132]

§ 130. Method of acquiring jurisdiction.

Jurisdiction of the person may be acquired by personal service of process, attachment, notice, or voluntary appearance, the rule being, however, that when a statute prescribes the mode of acquiring jurisdiction, the mode pointed out must be substantially complied with, or the judgment or order will be a nullity.[133] Jurisdiction of the subject matter depends on the provisions of the constitution, or the provisions of statutes enacted by the legislature in pursuance of authority granted by the constitution, and hence jurisdiction cannot be acquired by an inferior court from an erroneous assumption thereof, however long persisted in.[134]

Jurisdiction of the subject matter cannot be conferred by the consent of the parties,[135] but where the court has jurisdiction of the subject matter, consent may confer jurisdiction of the person.[136]

§ 131. Enlargement, diminution, or divestiture of jurisdiction.

The provision of the state constitution of 1846[137] continuing

132 See post, Part III.

133 Brown v. City of New York, 3 Hun, 685, 6 Thomp. & C. 164; Wortman v. Wortman, 17 Abb. Pr. 66; People ex rel. Gambling v. Board of Police, 6 Abb. Pr. 162, 26 Barb. 481.

134 Van Loon v. Lyons, 61 N. Y. 22.

135 Dudley v. Mayhew, 3 N. Y. (3 Comst.) 9; Daly v. Smith, 38 Super. Ct. (6 J. & S.) 158, 49 How. Pr. 150. So held in action against municipal corporations, Callahan v. City of New York, 66 N. Y. 656. For collection of cases, see 8 Abb. Cyc. Dig. 579, 580.

136 McCormick v. Pennsylvania Cent. R. Co., 49 N. Y. 303; Bucklin v. Chapin, 53 Barb. 488, 35 How. Pr. 155, 1 Lans. 443.

137 Const. 1846, art. 6, § 12.

in certain courts the powers and jurisdiction which they had at the time of the adoption of that article, deprived the legislature of all power to take from the courts mentioned their then existing jurisdiction.[138]

——**Repeal of statute.** Where jurisdiction is conferred by statute, a repeal of the statute must be absolute, and not merely affect details, in order to terminate all proceedings not fully completed,[139] and a special provision in a statute limiting the jurisdiction of a court can be repealed by a general act only by the use of express words or by necessary implication.[140]

——**Divestiture by subsequent event.** The general rule is that if the circumstances are such as to vest jurisdiction at the time the action is brought, it cannot be ousted by any subsequent event.[141] Thus, a court which has obtained jurisdiction does not lose it because, during the trial, one of its members is called from his place on the bench as a witness, and gives testimony.[142]

——**Enlargement of jurisdiction.** If the legislature confers upon courts of record generally a remedy entirely new, all courts of record alike may take the power, but where the legislature merely adds an additional ground for invoking an existing remedy, the term "court of record," used in the new act, applies only to courts of record exercising the jurisdiction to which the addition is made.[143]

§ 132. Amount in controversy.

The jurisdiction of a trial court often depends on the amount in controversy. Under the old chancery practice, it was necessary that at least one hundred dollars be involved, the rule proceeding on the theory that de minimis non curat lex.

——**Amount claimed.** The amount claimed, and not the

[138] Alexander v. Bennett, 60 N. Y. 204.
[139] Angel v. Town of Hume, 17 Hun, 374.
[140] People ex rel. McMahon v. Board of Excise, 3 State Rep. 253.
[141] Koppel v. Heinrichs, 1 Barb. 449.
[142] People v. Dohring, 59 N. Y. 374.
[143] People ex rel. McMahon v. Board of Excise, 3 State Rep. 253.

amount actually obtained, ordinarily constitutes the amount in controversy.[144]

—— **In actions where property rights are involved.** The value of the property is ordinarily the amount in controversy, where the action is to recover property, such as ejectment or replevin, or where the action is to quiet title.[145]

—— **Interest.** Interest becoming due during the pendency of the suit will not bring up the amount so as to make it within the required sum.[146]

—— **On consolidation of actions.** Where two actions are consolidated, the amount in controversy is the aggregate sum sought to be recovered.[147]

—— **Abandonment of part of claim.** A plaintiff may abandon a portion of his debt in order to reduce his claim to an amount within the jurisdiction of the trial court, where there is no fraud.[148]

—— **On removal of action.** Where a suit is commenced in one court and removed by defendant to another court, the fact that the judgment recovered exceeds the limit of the jurisdiction of the first court, does not render it invalid.[149]

§ 133. Concurrent and exclusive jurisdiction.

It is a general rule as to jurisdiction, that a statute conferring it on one court, does not operate to oust other courts before possessing it, since concurrent jurisdiction is not inconsistent.[150] It follows that, in order to prevent a conflict between different courts, where two actions are brought in dif-

144 Foley v. Gough, 4 E. D. Smith, 724.

145 In replevin, the plaintiff's special interest in the property claimed measures the value. Shea v. Smith, 12 Wkly. Dig. 252.

146 Knickerbacker v. Boutwell, 2 Sandf. Ch. 319.

147 Gillin v. Canary, 19 Misc. 594, 78 State Rep. 313, 26 Civ. Proc. R. (Scott) 230, 4 Ann. Cas. 200; Wheeler v. VanKuren, 1 Barb. Ch. 490.

148 People ex rel. Brownson v. Marine Court of City of New York, 36 Barb. 341, 14 Abb. Pr. 266, 23 How. Pr. 446; Bowditch v. Salisbury, 9 Johns. 366.

149 Ludwig v. Minot, 4 Daly, 481.

150 Cooke v. State Nat. Bank of Boston, 52 N. Y. 96.

As to effect of another action pending in general, see ante, §§ 27-41.

ferent courts having concurrent jurisdiction, the court which first acquires jurisdiction shall retain it, if it has power to administer all the relief required, and carry the litigation to its conclusion,[151] which includes the enforcement of the judgment, as by proceedings for contempt.[152] This rule applies to federal and state courts, so that where an action has been commenced in a federal court, another action cannot be subsequently brought in a state court, and vice versa, where the courts have concurrent jurisdiction;[153] and the rule is often followed in refusing to appoint a receiver where a receiver has already been appointed by the other court.

§ 134. Retaining action for complete relief.

The rule which prevailed in courts of equity, that where jurisdiction was once obtained, the case would be retained for such other and further relief as the evidence and pleading warranted, still prevails, so that even if the court cannot grant the equitable relief sought, it may still retain the action for the purpose of awarding damages or costs, to prevent a multiplicity of suits. A familiar illustration of this rule is an action for specific performance, where damages are often awarded, though a specific performance cannot be granted.[154]

§ 135. Local and transitory actions.

Originally, all actions were local. But by a fiction the courts of England permitted a party to allege, under a videlicet, that the place where the contract was made or the transaction occurred was in any county in England. This fictitious

[151] Conover v. City of New York, 5 Abb. Pr. 393, 25 Barb. 513; Garlock v. Vandevort, 128 N. Y. 374. For a further collection of the authorities, see 8 Abb. Cyc. Dig. 581-585.

[152] Pitt v. Davison, 37 N. Y. 235, 3 Abb. Pr., N. S., 398, 34 How. Pr. 355.

[153] Farnsworth v. Western Union Telegraph Co., 25 State Rep. 393; Farmers' Loan & Trust Co. v. Southern Telegraph Co., 21 Wkly. Dig. 457.

[154] Sentenis v. Ladew, 140 N. Y. 463. For collection of other authorities, see 5 Abb. Cyc. Dig. 742-746.

averment was held traversable for the purpose of contesting a jurisdiction not intended to be protected by the fiction, but not traversable for the purpose of defeating an action it was invented to sustain. The rule generally laid down to distinguish between the two is that if the cause of action is one that might have arisen anywhere then it is transitory, but if it could only have arisen in one place it is local. Actions for personal torts, wherever committed, and on contracts, wherever executed, are deemed transitory, and may be brought wherever the defendant can be found. Actions for injury to land are generally local,[155, 156] and if the property is located in the state the provisions of the Code make them local actions.

§ 136. Territorial extent of jurisdiction.

As a general rule the jurisdiction of a state court is limited to the territorial extent of the state, but it was held in an early case that jurisdiction may be upheld, wherever the parties, or the subject, or such a portion of the subject, are within the jurisdiction that an effectual decree can be made and enforced, so as to do justice between the parties.[157] While the distinction between transitory and local actions has always been maintained, cases have arisen in which the courts felt bound to exercise jurisdiction, though the ostensible object of the action was to work results out of their territorial jurisdiction, and though for that reason, the action seemed to partake somewhat of the characteristics of a local action. Nearly all, if not all, these cases arose in equity. Of course, the action had to be strictly against the person of the defendant, and the court had to acquire jurisdiction of the person by the service of process within its territorial jurisdiction, and the judgment prayed for had to be one which was enforceable against the defendant within such territorial jurisdiction. But where these elements concurred, and the cause of the controversy was not in its nature necessarily local (as it is in actions

[155, 156] Dodge v. Colby, 108 N. Y. 445; Sentenis v. Ladew, 140 N. Y. 463; Cragin v. Lovell, 88 N. Y. 258.

[157] Ward v. Arredondo, Hopk. Ch. 213.

of ejectment, trespass quare clausum fregit, waste, the prevention or abatement of a nuisance, etc.,) and especially where the defendant in the action was liable to the plaintiff, either in consequence of contract, or as a trustee, or as a holder of a legal title acquired by any species of mala fides practiced on the plaintiff, the courts did not hesitate to hold that the principles of equity gave to the court jurisdiction wherever the person might be found, and that the circumstance that a question of title might be involved in the inquiry, and might even constitute the essential point on which the case depends, was not sufficient to arrest jurisdiction.[158] Thus, the supreme court has jurisdiction to decree specific performance of a contract for purchase of lands lying in another state, when the parties are residents of this state;[159] or to cancel a usurious mortgage, though the lands mortgaged lie in another state;[160] or to foreclose a mortgage, though part of the premises covered by the mortgage are in another state;[161] or to enjoin a diversion of the earnings of a foreign railroad corporation;[162] or to declare void assignments executed in this state of property in other states;[163] or to transfer the possession of land or the title thereof, though situate without the jurisdiction, in case of fraud, trust or contract, though not where the action involves a mere naked question of title or of trespass;[164]

[158] Atlantic & Pac. Telegraph Co. v. Baltimore & O. R. Co., 46 Super. Ct. (14 J. & S.) 377. By Justice Freedman.

[159] Newton v. Bronson, 13 N. Y. (3 Kern.) 587; Myres v. DeMier, 4 Daly, 343. So held in a creditor's suit. Bailey v. Ryder, 10 N. Y. (6 Seld.) 363. So held where one of the parties was a nonresident, where the contract was to be performed in New York. Baldwin v. Talmadge, 39 Super. Ct. (7 J. & S.) 400. Otherwise where both parties are nonresidents. Hann v. Barnegat & Long Beach Imp. Co., 7 Civ. Proc. R. (Browne) 222.

[160] Williams v. Fitzhugh, 37 N. Y. 444; Williams v. Ayrault, 31 Barb. 364.

[161] Union Trust Co. v. Olmsted, 102 N. Y. 729, 2 State Rep. 506. See Farmers' Loan & Trust Co. v. Bankers' & Merchants' Telegraph Co., 44 Hun, 400, 9 State Rep. 347.

[162] Buel v. Baltimore & O. S. W. Ry. Co., 24 Misc. 646.

[163] D'Ivernois v. Leavitt, 23 Barb. 63.

[164] Chase v. Knickerbocker Phosphate Co., 32 App. Div. 400.

or to enforce the liability of a devisee of lands in another state which are charged with the payment of a legacy, although the testator was a resident of, and defendant was appointed executor in, such other state;[165] or to compel an accounting for a part of the excess of receipts over expenditures upon land in another state which plaintiff had conveyed to defendant who was to buy in a mortgage and certain debts, resell the land and pay plaintiff one-third the profits;[166] or to give damages for a fraudulent conspiracy, formed by defendants in another state, to divest plaintiff of his title to lands in that state:[167] but the courts of this state will not take jurisdiction of an action to set aside for fraud a conveyance of land within another state, which was executed and recorded there.[168]

——**Enforcement of statutes of another state or country as matter of comity.** The doctrine of comity has been commented on by the court of appeals as follows: "The question is thus presented whether a right of action unknown to the common law and existing only by force of the statutes of another state, can be enforced in the courts of this state, or outside of the local jurisdiction where the corporation is domiciled. * * * We think that when the statutes set forth in the complaint are carefully read, it is apparent from their language that they provide for a special and peculiar remedy against the stockholders of a corporation created under the laws of that state. From their whole structure and scope it is apparent that they were intended to operate and be enforced only within that jurisdiction. It is quite clear that as to some of their provisions, at least, it would be impossible to enforce them in this state, and they should be construed as enactments in pari materia, and as a whole. If it appears that they cannot as a whole scheme be given full effect in this state, we ought not to detach some particular provision from the gen-

165 Brown v. Knapp, 79 N. Y. 136.

166 Reading v. Haggin, 58 Hun, 450, 35 State Rep. 585.

167 Mussina v. Belden, 6 Abb. Pr. 165, followed in Latourette v. Clarke, 45 Barb. 327, 30 How. Pr. 242.

168 Cumberland Coal & Iron Co. v. Hoffman Steam Coal Co., 30 Barb. 159, 20 How. Pr. 62.

eral context with a view of ascertaining whether that is or is not enforceable beyond the local jurisdiction. But without reference to the special and peculiar provisions of these statutes, we think that the general current of authority is to the effect that such enactments are to be enforced only within the jurisdiction of the sovereignty where they exist. * * * In the case at bar the plaintiff's right of action has no other legal or moral basis than the fiat of a legislature of another state. It is a principle of universal application, recognized in all civilized states, that the statutes of one state have, ex proprio vigore, no force or effect in another. The enforcement in our courts of some positive law or regulation of another state depends upon our own express or tacit consent. The consent is given only by virtue of the adoption of the doctrine of comity as part of our municipal law. That doctrine has many limitations and qualifications, and generally each sovereignty has the right to determine for itself its true scope and extent. The courts of this state are open to all suitors to enforce rights of action, transitory in their nature, recognized by the common law or founded in natural justice, and when no law of the forum or any principle of public policy interferes. There is, however, a large class of foreign laws and statutes which, under the doctrine of comity, have no force in this jurisdiction. It belongs exclusively to each sovereignty to determine for itself whether it can enforce a foreign law without, at the same time, neglecting the duty that it owes to its own citizens or subjects. It has been held, and is a principle universally recognized, that the revenue laws of one country have no force in another. The exemption laws and laws relating to married women, as well as the local Statute of Frauds and statutes authorizing distress and sale for non-payment of rent, are not recognized in another jurisdiction under the principles of comity. * * * It is well understood also that the statutes of one state giving a right of action to recover a penalty have no force in another. * * * So also rights of action arising under foreign bankrupt, insolvent or assignment laws, are not recognized here when prejudicial to the interests of our own citizens."[169]

[169] Marshall v. Sherman, 148 N. Y. 9.

—— **Actions of trespass or waste.** An action will not lie in this state for trespass to lands in another state,[170] or for damages for waste committed to land situated outside of the state.[171]

—— **Actions based on torts in general.** Courts of this state have jurisdiction of actions for personal injuries committed without the state, where both or either of the parties are citizens of the United States.[172] But while the courts of this state have jurisdiction of an action based on a tort between nonresident individuals where the trespass is committed in another jurisdiction, yet the court will decline jurisdiction in actions of such character unless special circumstances are shown to exist which require the retention of jurisdiction.[173] A distinction, however, is made between torts founded on personal wrongs unconnected with contract and torts arising out of commercial transactions, it being held in the latter case that the rights of non-residents should be determined.[174] A court of this state not only has, but is bound to entertain, jurisdiction of an action between "residents" thereof for

170 American Union Telegraph Co. v. Middleton, 80 N. Y. 408; De Courcy v. Stewart, 20 Hun, 561; Jones v. City of New York, 37 Hun, 513; Dodge v. Colby, 108 N. Y. 445, 13 State Rep. 848, 28 Wkly. Dig. 223; Genet v. Delaware & H. Canal Co., 29 State Rep. 954; Sprague Nat. Bank v. Erie R. Co., 40 App. Div. 69.

171 Cragin v. Lovell, 88 N. Y. 258.

172 Glen v. Hodges, 9 Johns. 67; McIvor v. McCabe, 16 Abb. Pr. 319, 26 How. Pr. 257; Newman v. Goddard, 3 Hun, 70, 5 Thomp. & C. 299, 48 How. Pr. 363. So held in action for slander, Lister v. Wright, 2 Hill, 320; Boynton v. Boynton, 43 How. Pr. 380. So held in action for damages on account of false representations. Latourette v. Clarke, 45 Barb. 327, 30 How. Pr. 242.

173 Hoes v. New York, etc., Ry. Co., 173 N. Y. 435, 441; Collard v. Beach, 81 App. Div. 582; Burdick v. Freeman, 120 N. Y. 420, 31 State Rep. 427; Winchester v. Browne, 37 State Rep. 542; Ferguson v. Neilson, 33 State Rep. 814. It seems that where the only reasons alleged by plaintiff for bringing the action in this state were that the defendant was a man of means and might have something to do with the jury "in our place, he being acquainted," and that he was advised by his attorney that if he instituted the action in this state he could have the defendant arrested, the court should not retain jurisdiction of it. Burdick v. Freeman, 46 Hun, 138, 10 State Rep. 756.

174 Wertheim v. Clergue, 53 App. Div. 124.

false imprisonment and malicious prosecution of the plaintiff by her arrest and imprisonment in a foreign country.[175]

A rule of the New York city court provides that torts committed on board a foreign ship on the high seas, must generally be considered as having occurred within the territorial limits of the foreign nation to which the vessel belongs, and the parties having the ship's equipage, though actually here, can, in law, be considered remaining within the foreign jurisdiction. In such a case, the court, having a discretion to exercise the power, have decided to decline jurisdiction, unless it is made to appear either that the plaintiff or defendant has been regularly discharged from his ship by competent authority; or, second, that either of the parties is a resident or citizen of the United States. In the excepted cases only will process be allowed.[176]

—— **Actions on contracts.** The courts of New York will entertain jurisdiction of an action for breach of contract, though all the parties reside in another state,[177] especially where the contract is to be performed in this state.[178]

—— **Actions relating to foreign trusts.** In certain cases, the courts of New York have jurisdiction of actions and proceedings involving a trust created in another state or country. The jurisdiction usually depends on an interested party being a resident of the state, or on the fact that the subject of the trust, or a part thereof, is property situated within the state, or on the fact that the cause of action arose in this state. Thus there is no jurisdiction over a foreign executor except where assets have been brought into this state,[179] and where

[175] Tupper v. Morin, 25 Abb. N. C. 398.

[176] Rule 22 of the Rules of the City Court of New York.

[177] Belden v. Wilkinson, 44 App. Div. 420; Smith v. Crocker, 14 App. Div. 245, 77 State Rep. 427, 4 Ann. Cas. 77; Furbush v. Nye, 17 App. Div. 325, 79 State Rep. 214, 4 Ann. Cas. 241.

[178] Connecticut Mut. Life Assur. Co. v. Cleveland, C. & C. R. Co., 23 How. Pr. 180.

See, also, Perry v. Erie Transfer Co., 28 Abb. N. C. 430, 46 State Rep. 185, 22 Civ. Proc. R. (Browne) 178, where cause of action was held to arise in another state.

[179] Gray v. Ryle, 50 Super. Ct. (18 J. & S.) 198; Fischer v. Fischer, 50 Super. Ct. (18 J. & S.) 74; Kohler v. Knapp, 1 Bradf. Surr. 241.

an accounting is required the courts have no further jurisdiction than to require an account only as to such assets as the testator left in this state[180] except perhaps where the bulk of the estate is here and no injury could arise by requiring a full account.[181] The general rule is that foreign executors are not recognized in their official capacity by domestic courts of law, and cannot be sued therein as such, though actions in equity may be brought, where there is property in this state, to prevent its waste and secure its application to the payment of the debts of the testator,[182] but such rule does not apply to an action against a foreign executor or administrator founded on a personal contract made by himself, though with reference to the estate.[183] A receiver or other trustee appointed in another state will be permitted, on principles of comity, to bring an action in the courts of this state, for the protection of the estate which he represents, when by so doing, the rights of domestic creditors are in nowise interfered with,[184] and it follows that a resident plaintiff may sue here a receiver of a corporation appointed in another state on an agreement made with him, arising out of a transaction had within this state.[185] A receiver of a national bank may sue here, the federal courts not having exclusive jurisdiction.[186] A non-resident may sue a foreign executor who has taken out letters here, where the cause of action arose here against the testator in his lifetime,[187] but a non-resident administrator of a non-resident decedent, though so appointed in this state, cannot sue here a

180 Matter of Gaines' Will, 84 Hun, 520, 65 State Rep. 615; Coley's Estate, 14 Abb. Pr. 461.

181 Coley's Estate, 14 Abb. Pr. 461.

182 Field v. Gibson, 56 How. Pr. 232; Kanter v. Peyser, 51 Super. Ct. (19 J. & S.) 441.

183 Murphy v. Hall, 38 Hun, 528.

184 Runk v. St. John, 29 Barb. 585; Matter of Waite, 99 N. Y. 433; LeFevre v. Matthews, 39 App. Div. 232; Toronto General Trust Co. v. Chicago, B. & Q. R. Co., 123 N. Y. 37.

Foreign trust held not enforcible. Alger v. Alger, 31 Hun, 471.

185 LeFevre v. Matthews, 39 App. Div. 232.

186 Peters v. Foster, 56 Hun, 607, 18 Civ. Proc. R. (Browne) 380, 32 State Rep. 174; Platt v. Crawford, 8 Abb. Pr., N. S., 308.

187 Hopper v. Hopper, 125 N. Y. 400.

foreign corporation, for injuries sustained without the jurisdiction, resulting in the death of his intestate.[188]

—— **Actions by and against foreign corporations.** Before the Revised Statutes, a foreign corporation could not be sued at law in invitum, in the New York courts. The reason for the rule was the supposed difficulty of serving process. The Revised Statutes provided that suits in the supreme court against a foreign corporation could be commenced by attachment, which was followed by the act of 1849 and section 427 of the Code of Procedure both passed at the same session of the legislature and containing different provisions.[189] All questions arising thereunder have, however, been set at rest by the Code of Civil Procedure which provides that an action may be maintained by a foreign corporation, in like manner, and subject to the same regulations as where the action is brought by a domestic corporation, except as otherwise specially prescribed by law. But a foreign corporation cannot maintain an action, founded upon an act, or upon a liability or obligation, express or implied, arising out of, or made and entered into in consideration of an act, which the laws of the state forbid a corporation or association of individuals to do, without express authority of law.[190] So an action against a foreign corporation may be maintained by a resident of the State, or by a domestic corporation, for any cause of action. An action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases only:

1. Where the action is brought to recover damages for the breach of a contract, made within the state, or relating to property situated within the state, at the time of the making thereof.
2. Where it is brought to recover real property situated

[188] Robinson v. Oceanic Steam Nav. Co., 112 N. Y. 315.

[189] For a history of the various statutes, see Gibbs v. Queen Ins. Co., 63 N. Y. 114; Atlantic & Pac. Telegraph Co. v. Baltimore & O. R. Co., 46 Super. Ct. (14 J. & S.) 377.

The subject of actions by, between, or against foreign corporations will be treated of in detail in a subsequent chapter.

[190] Code Civ. Proc. § 1779.

within the state, or a chattel, which is replevied within the state.

3. Where the cause of action arose within the state, except where the object of the action is to affect the title to real property situated without the state.[191]

It should be kept in mind however that these Code provisions refer to jurisdiction of the person rather than to jurisdiction of the subject matter, and do not restrict the jurisdiction before exercised, so that now, as well as before, jurisdiction may be obtained, irrespective of the parties to the action, where the parties appear and submit to the jurisdiction of the court.[192] The early rule that the extent of the power of the court over a foreign corporation, where there has not been a voluntary appearance in the action, is to subject property of such corporation within this state to payment of its debts, by judgment in rem as to such property, after the same has been attached before judgment is rendered, according to directions of the Code,[193] has been overruled and now a judgment against a foreign corporation has the same force and effect as a judgment against a non-resident natural person.[194]

§ 137. Presumptions as to jurisdiction.

The rule is that jurisdiction will be presumed in favor of a superior court of general jurisdiction, but that no presumption will be entertained in favor of the jurisdiction of inferior courts, whose jurisdiction must be made affirmatively to appear. There is a limitation, however, on this rule, in that when a superior court exercises a statutory power or juris-

191 Code Civ. Proc. § 1780; Monda v. Wells, Fargo & Co., 20 Misc. 685; Hallenborg v. Greene, 66 App. Div. 590; Anglo-American Provision Co. v. Davis Provision Co., 50 App. Div. 273; Day v. Sun Ins. Co., 40 App. Div. 305; Walter v. McAlister, 21 Misc. 747.

192 Collection of cases as to jurisdiction over foreign corporations, see 8 Abb. Cyc. Dig. 599-604.

193 Brewster v. Michigan Cent. R. Co., 5 How. Pr. 183, 3 Code R. 215; Hulbert v. Hope Mut. Ins. Co., 4 How. Pr. 275, 2 Code R. 148.

194 Cumberland Coal & Iron Co. v. Hoffman Steam Coal Co., 30 Barb. 159; Gibbs v. Queen Ins. Co., 63 N. Y. 114.

diction, where the procedure is special or summary, the record must show the jurisdictional facts.[195] The question whether jurisdiction will be presumed generally arises where a collateral attack is made on the judgment or order of a court. However, the presumption of jurisdiction arising where the record is silent in regard thereto, does not apply where the record affirmatively shows want of jurisdiction. Whether this presumption exists, will determine the necessity of setting forth the jurisdiction where a judgment or order is pleaded.[196]

§ 138. Effect of want of jurisdiction.

Want of jurisdiction of the subject matter renders the order or judgment "void," the objection being one that cannot be waived by failure of a party to act.[197] Want of jurisdiction of the person, where there is no appearance, also makes the judgment or order void, but where the party appears and fails to object on the ground of want of jurisdiction of his person, the objection is waived, and the subsequent order or judgment is valid.[198]

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195 Sargent v. Sargent Granite Co., 31 Abb. N. C. 131, 6 Misc. 384, 56 State Rep. 335.

196 See 8 Abb. Cyc. Dig. 586, 587. Distinction between courts of general and limited jurisdiction, see ante, § 94. Collateral attack, see chapter on judgments. Pleading judgment, see post, § 799, p. 851.

197 Bingham v. Disbrow, 14 Abb. Pr. 251, 37 Barb. 24. The rule applies to courts of limited as well as to courts of general jurisdiction. Bloom v. Burdick, 1 Hill. 130; Hard v. Shipman, 6 Barb. 621. Manner of raising objection, see post, §§ 768-783.

198 Stone v. Miller, 62 Barb. 430; People ex rel. Waldron v. Soper, 7 N. Y. (3 Seld.) 428.

§ 139. Exclusiveness of power granted to federal courts.

In order that a United States statute operate to exclude the jurisdiction of the state courts over matters within their ordinary jurisdiction, there must be express words of exclusion or a manifest repugnancy in the exercise of state authority over the subject.[199]

§ 140. Admiralty and maritime cases.

The general rule is that state courts have no jurisdiction of causes of action arising on the high seas, or the waters of the United States, since the constitution and laws of the United States give exclusive cognizance to United States courts of all cases involving admiralty and maritime jurisdiction.[200] The federal judiciary act declares that the district courts of the United States shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it.[201] The terms, "admiralty and maritime jurisdiction," extend to all things done upon and relating to the sea, to transactions relating to commerce and navigation, and to damages and injuries upon the sea, and all maritime contracts, torts and injuries.[202] Charter-

199 Kidder v. Horrobin, 72 N. Y. 159; People v. Welch, 141 N. Y. 266; Teall v. Felton, 1 N. Y. (1 Comst.) 537.

200 Const. U. S., art. 3, § 2.

201 1 U. S. Statutes at Large, 77.

202 Bird v. Steamboat Josephine, 39 N. Y. 19.

parties, affreightments, marine hypothecations, contracts for marine service in the building, repairing, supplying and navigating ships, are, among other things, embraced in the term, "maritime contracts."[203] A suit to enforce a maritime lien can be brought only in the federal courts.[204]

—— **What are common law remedies.** On a review of the authorities, it may be stated as a general rule that where only a personal judgment is sought against the owners of a vessel, the state courts have jurisdiction, whether the action is based on contract or on tort, and an ancillary attachment does not convert the proceeding into one in rem. Proceedings in rem are not within the jurisdiction of a state court, since not "a common law remedy" within the act of congress.[205] The state courts have jurisdiction of actions for the collection of claims, or the creation or enforcement of liens, on vessels within the territorial jurisdiction of the state, where such claims are not founded on maritime contracts or torts,[206] and hence have jurisdiction of actions on contract relating to vessels wholly engaged in internal commerce,[207] or a claim of a stevedore for services in unloading a vessel,[208] or claims for wages of person employed on a canal boat,[209] or to enforce a lien for "building," as distinguished from "repairing," a vessel,[210] the rule being that where supplies are furnished at the home port to a domestic ship, the state cannot, by legislation, create liens in favor of materialmen for stores and supplies furnished,[211] especially where the ship is engaged in for-

[203] Bird v. Steamboat Josephine, 39 N. Y. 19.

[204] Brown v. Gray, 70 Hun, 261.

[205] Bird v. Steamboat Josephine, 39 N. Y. 19; Ferran v. Hosford, 54 Barb. 200; Bartlett v. Spicer, 75 N. Y. 528.

[206] Andrews v. Betts, 8 Hun, 322; Brookman v. Hamill, 43 N. Y. 554.

[207] Fralick v. Betts, 13 Hun, 632.

[208] Fisher v. Luling, 33 Super. Ct. (1 J. & S.) 337.

[209] U. S. Rev. St. § 4251. Ryan v. Hook, 34 Hun, 185, held that towing corporation was not within statute.

[210] Wilson v. Lawrence, 18 Hun, 56; Coryell v. Perine, 29 Super. Ct. (6 Rob.) 23; Sheppard v. Steele, 43 N. Y. 52; Repairing. Murphy v. Salem, 1 Hun, 140, 3 Thomp. & C. 660.

[211] A lien given by a state statute on domestic ships, for repairs or supplies, such as would be the matter of a suit in admiralty in personam, cannot be enforced, under the state statute, in the courts of the

eign commerce.[212] The fact that a lien given by the statutes, providing for the collection of demands against ships and vessels, is sought to be enforced against a steamboat by its name, does not necessarily make the case one of admiralty jurisdiction, since this depends upon the character of the claim as a maritime contract.[213]

—— **Torts.** The state courts and the federal courts have concurrent jurisdiction in the matter of personal torts committed at sea, such as assault by a master on crew and injuries to passengers,[214] though both parties are foreigners,[215] or the death of a passenger on a steamboat by the negligence of the owners, in the waters of this state,[216] and such jurisdiction is not precluded by the act of congress (9 U. S. Stat. at L. 635) limiting the liability of ship-owners for negligently causing the death of a passenger or for the loss of goods intrusted to the vessel as a common carrier,[217] but state courts have no jurisdiction to administer the relief prescribed by such limited liability act.[218] Jurisdiction of an action for an injury resulting from the collision of a vessel with a pier is in the state and not the United States courts.[219]

states. The exclusive cognizance conferred on the district courts of the United States in matters of admiralty and maritime jurisdiction, excludes all jurisdiction from the state courts except such concurrent remedy as is given by the common law. Bird v. Steamboat Josephine, 39 N. Y. 19; Murphy v. Salem, 1 Hun, 140; Wilson v. Lawrence, 18 Hun, 56. Contra—Matter of Steamship Circassian, 50 Barb. 490.

212 Poole v. Kermit, 59 N. Y. 554.

Statute held constitutional in so far as it applied to ships navigating interior waters. King v. Greenway, 71 N. Y. 413.

213 King v. Greenway, 71 N. Y. 413. Contra—Ferran v. Hosford, 54 Barb. 200.

214 McDonald v. Mallory, 77 N. Y. 546; Wilson v. Mackenzie, 7 Hill, 95.

See, also, Percival v. Hickey, 18 Johns. 257.

215 Gardner v. Thomas, 14 Johns. 134.

216 Dougan v. Champlain Transp. Co., 56 N. Y. 1.

217 Baird v. Daly, 57 N. Y. 236; Dougan v. Champlain Transp. Co., 56 N. Y. 1; Knowlton v. Providence & N. Y. Steamship Co., 53 N. Y. 76.

218 Chisholm v. Northern Transp. Co. of Ohio, 61 Barb. 363; Elwell v. Bender, 79 Hun, 243.

219 Elwell v. Bender, 79 Hun, 243, 61 State Rep. 55.

—— **Salvage.** As a maritime demand in rem, state courts cannot enforce a claim for salvage against a vessel or cargo. Whether they have jurisdiction in an action in personam to ascertain and determine the rights of salvors, as against persons liable for salvage, is doubtful, yet courts of common law have jurisdiction in respect to salvage and may even determine the validity and extent of a lien for salvage.[220]

—— **Questions of prize.** No action will lie at common law for a legal capture on the high seas, as prize of war, and hence state courts have no jurisdiction.[221]

—— **Enforcement of stipulation given in admiralty proceedings.** A state court has no jurisdiction of an action to enforce a stipulation entered into in a proceeding in rem in admiralty.[222]

—— **Enforcement in federal court of lien given by state statute.** The admiralty court may enforce a lien created by a state statute, where in aid of a claim which is a maritime claim.[223]

§ 141. National banks.

Actions by or against national banks, or their receivers, are within the jurisdiction of a state court, the federal courts not having exclusive jurisdiction.[224]

§ 142. Cases involving patents.

State courts have no jurisdiction of actions to protect and enforce patent rights, such as an action for damages for infringement of a patent,[225] or to enjoin the infringement of a

[220] Hawkins v. Avery, 32 Barb. 551; Frith v. Crowell, 5 Barb. 209; Cashmere v. DeWolf, 4 Super. Ct. (2 Sandf.) 379; Sturgis v. Law, 5 Super. Ct. (3 Sandf.) 451.

[221] Novion v. Hallett, 16 Johns. 327.

[222] Bartlett v. Spicer, 75 N. Y. 528.

[223] Thompson v. Van Vechten, 12 Super. Ct. (5 Duer) 618.

[224] Cooke v. State Nat. Bank of Boston, 52 N. Y. 96; Robinson v. National Bank of Newberne, 81 N. Y. 385; Brinckerhoff v. Bostwick, 88 N. Y. 52; Peters v. Foster, 56 Hun, 607.

[225] Parsons v. Barnard, 7 Johns. 144; Burrall v. Jewett, 2 Paige, 134; Waterman v. Shipman, 130 N. Y. 301; Denise v. Swett, 142 N. Y.

patent,[226] pendente lite,[227] or to enjoin the manufacture and sale of patented articles by the patentee, by reason of an agreement claiming to vest the title in plaintiff,[228] or to enjoin parties from prosecuting action alleged to be malicious, in the federal courts, against either the purchasers, sellers, or users of an article claimed to be an infringement of a patent,[229] or for damages because of alleged libelous charges of infringing a patent,[230] or to determine, in a direct action, the validity of a patent.[231]

On the other hand, state courts have jurisdiction when the validity of a patent is only questioned collaterally,[232] or where the action is to enforce a contract in respect to a patent, where its validity is not directly involved,[233] as where the action relates solely to the question of the existence of a license under

602. An action will not lie in a state court by the owner of a patented invention to recover the amount of royalties payable by defendant under a contract with a third person, who claims the right to the patent, or to enjoin the payment of the amount due under the contract to such person. There being no contract between defendant and plaintiff, the latter's remedy is by action for an infringement, of which the federal courts have exclusive jurisdiction. Allison Bros. Co. v. Hart, 56 Hun, 282, 30 State Rep. 697.

226 Dudley v. Mayhew, 3 N. Y. (3 Comst.) 9; Continental Store Service Co. v. Clark, 100 N. Y. 365. Where the existence and validity of a patent for an invention must necessarily be shown, to enable plaintiff to make out his cause of action, e. g. in an action to restrain defendant from using, upon articles manufactured by him, a name to which plaintiff claims an exclusive right as patentee of the article, and where defendant denies this right, a state court has no jurisdiction. Tomlinson v. Battel, 4 Abb. Pr. 266.

227 Hat Sweat Mfg. Co. v. Reinoehl, 102 N. Y. 167.

228 Kayser v. Arnold, 41 Hun, 275.

229 Childs v. Tuttle, 54 Hun, 57, 26 State Rep. 19.

230 Hovey v. Rubber Tip Pencil Co., 57 N. Y. 119.

231 Maitland v. Central Gas & Electric Fixture Co., 7 Misc. 245, 58 State Rep. 35.

232 Baylis v. Bullock Electric Mfg. Co., 32 Misc. 218; Saxton v. Dodge, 57 Barb. 84; Mayer v. Hardy, 11 Wkly. Dig. 130; Herzog v. Heyman, 151 N. Y. 587. The state court has jurisdiction of an action upon a bond conditioned to pay a sum of money, if, on examination of the record at Washington, and of United States letters patent, the patent be not found valid. Middlebrook v. Broadbent, 47 N. Y. 443.

233 Mayer v. Hardy, 127 N. Y. 125.

a patent[234] or the right to a forfeiture of the license,[235] or is to determine the title to a patent as between partners,[236] or to punish interference with the title and possession of a patent right vested in a receiver,[237] or to recover damages for false statements that articles manufactured by plaintiff are an infringement of defendant's patent, where the only issue is based on the existence or non-existence of fraud,[238] or to enjoin the breach of an agreement not to divulge a patentable invention.[239]

§ 143. Cases involving copyrights.

The United States courts have exclusive jurisdiction to protect rights secured by the copyright laws of congress,[240] but the original jurisdiction of state courts to enjoin a violation of the common law right of an author in his productions, has not been impaired or affected.[241]

§ 144. Cases involving trademarks.

The state courts have no jurisdiction to restrain infringement of a trademark as to a patented article, the rights being subject to the federal jurisdiction.[242]

§ 145. Proceedings in bankruptcy.

The federal courts have exclusive jurisdiction in all matters arising under the bankruptcy law but this does not preclude jurisdiction of the state courts of controversies between the assignee in bankruptcy and adverse claimants or of actions by trustees in bankruptcy for the recovery of assets of the estate,

234 Waterman v. Shipman, 130 N. Y. 301.
235 Hyatt v. Ingalls, 124 N. Y. 93.
236 DeGraff v. Cummins, 23 Wkly. Dig. 285.
237 Matter of Woven Tape Skirt Co., 12 Hun, 111.
238 Snow v. Judson, 38 Barb. 210.
239 Hammer v. Barnes, 26 How. Pr. 174.
240 Potter v. McPherson, 21 Hun, 559.
241 Woolsey v. Judd, 11 Super. Ct. (4 Duer) 379, 11 How. Pr. 49; Jewelers' Mercantile Agency v. Jewelers' Weekly Pub. Co., 84 Hun, 12, 65 State Rep. 198.
242 Wilcox & Gibbs Sewing Mach. Co. v. Kruse & Murphy Mfg. Co., 3 State Rep. 590, 25 Wkly. Dig. 454, 14 Daly, 116.

though there is some conflict of authority in the federal decisions in regard to the concurrent jurisdiction of a state court.[243] Under former bankruptcy laws, it was held in this state that the state courts have jurisdiction of actions against an assignee in bankruptcy for fraudulent conversion,[244] or to foreclose a mortgage,[245] and of actions by an assignee to collect the assets of the bankrupt,[246] or to set aside transfers void only because in contravention of the bankrupt act,[247] and of actions to determine the title to property of the bankrupt.[248]

§ 146. Actions by or against state, United States, or foreign government.

State courts have concurrent jurisdiction of controversies where a state is a party,[249] or where a foreign government is plaintiff,[250] or where the United States is plaintiff, or, if it consents, where it is defendant.[251]

§ 147. Jurisdiction over military and naval reservations and federal property.

A state court has jurisdiction of an action for a tort committed on a citizen within the limits of the Brooklyn navy yard,[252] or of summary proceedings by a landlord who had

243 That state court has jurisdiction of actions by or against trustee, see Small v. Muller, 67 App. Div. 143; Silberstein v. Stahl, 63 App. Div. 614, 71 N. Y. Supp. 1148; Frank v. McAdams, 32 Misc. 512; Jones v. Schermerhorn, 53 App. Div. 494.

244 Berford v. Barnes, 45 Hun, 253, 10 State Rep. 386.

245 Andrews v. Townshend, 16 State Rep. 876, 56 Super. Ct. (24 J. & S.) 140.

246 Kidder v. Horrobin, 72 N. Y. 159; Olcott v. Maclean, 73 N. Y. 223; Platt v. Jones, 96 N. Y. 24.

247 Cook v. Whipple, 55 N. Y. 150.

248 Doyle v. Sharp, 41 Super. Ct. (9 J. & S.) 312.

249 Burrall v. Jewett, 2 Paige, 134; Gibson v. Woodworth, 8 Paige, 132; Delafield v. State of Illinois, 26 Wend. 192, 2 Hill, 159.

250 Republic of Mexico v. Arrangois, 11 How. Pr. 576, 3 Abb. Pr. 470. Compare Hassard v. United States of Mexico, 29 Misc. 511.

251 Johnston v. Stimmel, 89 N. Y. 117; United States v. Dodge, 14 Johns. 95; United States v. Graff, 67 Barb. 304, 4 Hun, 634.

252 Armstrong v. Foote, 11 Abb. Pr. 384.

rented a part of the navy yard from the United States.[253] An action for damages for interfering with plaintiff's qualified right of possession of lands, the title to which is in the United States, may be brought in a state court,[254] as may an action against the commanding officer of a military reservation ceded to the United States, for damages for personal injuries received on the grounds from the officer's dog,[255] but state courts have no jurisdiction of an action for dower in property lying within lands ceded by the state to the United States.[256]

§ 148. Actions by or against United States officers.

The state court has jurisdiction of an action against a postmaster for wrongfully withholding mail matter,[257] or to recover goods in the possession of the keeper of a bonded warehouse,[258] or against a navy officer for wrongful punishment on ship-board;[259] and an action by the collector of customs on a receipt for safe keeping of forfeited goods, may be brought in a state court.[260]

§ 149. Cases involving consuls or ambassadors.

The constitution and laws of the United States prohibit state courts from taking cognizance of suits affecting ambassadors and consuls, and hence a state court has no jurisdiction to grant process against a consul in an action in which he is named as defendant, though he is sued with others on a joint liability.[261] An action commenced by attachment is a suit against an ambassador within the federal statutes.[262] On the other hand,

[253] Lotterle v. Murphy, 67 Hun, 76, 51 State Rep. 553.
See, also, Barrett v. Palmer, 47 State Rep. 876.
[254] Delamater v. Folz, 50 Hun, 528, 20 State Rep. 821.
[255] Madden v. Arnold, 22 App. Div. 240.
[256] Dibble v. Clapp, 31 How. Pr. 420.
[257] Teall v. Felton, 1 N. Y. (1 Comst.) 537.
[258] McButt v. Murray, 10 Abb. Pr. 196.
[259] Wilson v. Mackenzie, 7 Hill, 95.
[260] Sailly v. Cleveland, 10 Wend. 156. See, also, United States v. Graff, 67 Barb. 304, 4 Hun, 634.
[261] Rock River Bank v. Hoffman, 14 Abb. Pr. 72; Valarino v. Thompson, 7 N. Y. (3 Seld.) 576; Sippile v. Albites, 5 Abb. Pr., N. S., 76.
[262] Matter of Aycinena, 3 Super. Ct. (1 Sandf.) 690.

a consul who desires to obtain the arrest of a deserter from vessels belonging to his government, cannot apply to a state magistrate but must apply to the federal authorities.[263]

§ 150. Writs of habeas corpus.

Formerly it was the rule that a state court could issue a writ of habeas corpus where a person was detained under the laws of the United States, as where soldiers were held under federal authority, but the rule has been changed so that now state courts have no jurisdiction in such cases.[264]

ART. VI. COURT OF APPEALS.

§ 151. Scope of subdivision.

As this volume is not intended to cover appellate practice and procedure, the question of the right to appeal to the court of appeals as dependent on whether the judgment or order is final, whether the order is discretionary, the amount in controversy, etc., will not be considered. The right to appeal from certain orders and judgments will be referred to, however, in subsequent chapters treating of such orders or judgments.

263 Matter of Leon, 1 Edm. Sel. Cas. 311; Matter of Bruni, 11 Barb. 187.

264 Matter of Hopson, 40 Barb. 34; Matter of Beswick, 25 How. Pr. 149; Matter of O'Connor, 48 Barb. 258; O'Conner's Case, 3 Abb. Pr., N. S., 137; Rielly's Case, 2 Abb. Pr., N. S., 334; People ex rel. Macdonnell v. Fiske, 45 How. Pr. 294.

§ 152. Historical.

The first state constitution, adopted in 1777, provided for the creation of a "Court for the Trial of Impeachments and Correction of Errors." This provision was subsequently, in 1784, carried into effect by the Legislature. The court, as thus organized, continued in existence substantially without change in its jurisdiction, powers, and duties, until, in 1846, it was abolished by the constitution then adopted. The court of errors consisted of the president of the senate for the time being, and the senators, chancellor, and judges of the supreme court, or a majority of them. By virtue of its jurisdiction as a court for the correction of errors, it had power to review, on a writ of error, the judgments of the supreme court, and, on appeal, decrees and decretal orders of the court of chancery. Writs of error were issued by the chancellor. In civil causes, and in criminal cases not capital, a writ of error was matter of right, and was issued as of course.

During the whole period of its existence, the court of errors was the court of last resort; and its decisions were final and controlling, subject only to appeal to the United States supreme court, in the cases allowed by the federal constitution. As respects its jurisdiction in the correction of errors, the court of errors was succeeded by the present court of appeals, which was first established under the constitution of 1846. As then organized and until the amendment of 1870, it consisted of eight judges. Four of these were elected by the people of the state at large, and the other four were selected from the class of justices of the supreme court having the shortest time to serve. Under the amendment of the judiciary article of the constitution of 1869, and Laws 1870, c. 203, which carried it into effect, the court was reorganized, having a chief judge and six associate judges, elected by the state at large, for the term of fourteen years. The jurisdiction and powers of the former court were continued under this change. In consequence of the great accumulation of business on the calendar of the court of appeals at the time of the reorganization, a commission of appeals was created, consisting chiefly of the former members of the court, who were charged with the determination of all causes then pending in the court. In 1888,

section 6 of article 6 of the state constitution was amended by adding a provision, authorizing the designation by the governor of seven justices of the supreme court to act as associate justices, for the time being, of the court of appeals, and to form a second division of said court. Such second division, so appointed, sat from March 5th, 1889, until October 1st, 1892, when it was dissolved, pursuant to law. The judiciary article of the constitution adopted in 1894, limited the jurisdiction of the court of appeals to the review of questions of law.

§ 153. Jurisdiction.

Since the constitution of 1894, the court of appeals has exclusive jurisdiction to review upon appeal every actual determination made prior to 1896, at a general term of the supreme court, or by either of the superior city courts, as then constituted, in all cases in which, under the then provisions of law, appeals might be taken to the court of appeals. The jurisdiction of the court of appeals is, in civil actions and proceedings, confined to the review upon appeal of the actual determination made by the appellate division of the supreme court in either of the following cases, and no others: 1. Appeals may be taken as of right to said court, from judgments or orders finally determining actions or special proceedings, and from orders granting new trials on exceptions, where the appellants stipulate that upon affirmance, judgment absolute shall be rendered against them. 2. Appeals may also be taken from determinations of the appellate division of the supreme court in any department where the appellate division allows the same, and certifies that one or more questions of law have arisen which, in its opinion, ought to be reviewed by the court of appeals, in which case the appeal brings up for review the questions or questions so certified, and no other.[264a]

[264a] Code Civ. Proc. § 190, as amended to correspond with Const. 1894. The provisions of the new constitution and of the Code allow appeals as matter of right in three classes of cases only (1) appeals from final judgments in actions, (2) appeals from final orders in special proceedings, (3) appeals from orders granting new trials on exceptions, where a stipulation is given for judgment absolute. Van Arsdale v. King, 155 N. Y. 325.

The words "appeals may be taken as of right to said court, from

——**Exceptions and qualifications as to jurisdiction.** 1. No appeal shall be taken to the court of appeals, in any civil action or proceeding commenced in any court other than the supreme court, court of claims, county court, or a surrogate's court, unless the appellate division of the supreme court allows the appeal by an order made at the term which rendered the determination, or at the next term after judgment is entered thereupon and shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals.[265] 2. No appeal shall be taken to the court of appeals from a judgment of affirmance hereafter rendered in an action to recover damages for a personal injury, or to recover damages for injuries resulting in death, or in an action to set aside a judgment, sale, transfer, conveyance, assignment or written instrument, as in fraud of the rights of creditors, or in an action to recover wages, salary, or compensation for services, including expenses incidental thereto, or damages for breach of any contract therefor, or in an action upon an individual bond or individual undertaking on appeal, when the decision of the appellate division of the supreme court is unanimous, unless such appellate division shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals, or unless in case of its refusal to so certify, an appeal is allowed by a judge of the court of appeals.[266] 3. The

judgments or orders finally determining actions or special proceedings" refer to final judgments in actions and final orders in special proceedings. There can be no such thing as an order finally determining an action. Van Arsdale v. King, 155 N. Y. 325.

[265] Code Civ. Proc. § 191, as amended.

[266] Code Civ. Proc. § 191, as amended.

The amendment of Code Civ. Proc., § 191, by L. 1896, c. 559, prohibiting appeals from unanimous decisions in actions for personal injury was a competent exercise of legislative power. Croveno v. Atlantic Ave. R. Co., 150 N. Y. 225.

An action by an attorney as upon a quantum meruit to recover for professional services is within the provision, and a judgment entered upon a unanimous affirmance in such action is not appealable to the court of appeals. Boyd v. Gorman, 157 N. Y. 365.

Where an order of the appellate division affirming a judgment in an action for personal injuries, recites that one of the justices sat but did not vote and that the remaining four justices concurred in affirm-

jurisdiction of the court is limited to a review of questions of law.[267] 4. No unanimous decision of the appellate division of the supreme court that there is evidence supporting or tending to sustain a finding of fact or a verdict not directed by the court, shall be reviewed by the court of appeals.[268]

——**Jurisdiction limited by constitution and statutes.** The jurisdiction of the court of appeals is only such as is conferred by the constitution and statutes passed in pursuance thereof.[269]

——**Power of legislature to restrict jurisdiction.** The constitution of 1894, provides that the legislature may further restrict the jurisdiction of the court of appeals, and the right of appeal thereto, but the right to appeal shall not depend upon the amount involved.[270] It has been held thereunder, that the legislature has power to restrict the right to appeal, even from a final judgment or order, within the limitations prescribed by the constitution and to deny the right of appeal in any class or classes of actions, in its discretion, the only restriction upon the legislative power being that the right shall not be made to depend on the amount involved.[271]

§ 154. Officers.

The officers of the court of appeals are the clerk of the court, deputy clerk, assistant clerks,[272] a special clerk for each

ance, it is not a unanimous affirmance which will preclude a review in the court of appeals. Warn v. New York Cent. & H. R. R. Co., 163 N. Y. 525.

267 Code Civ. Proc. § 191.

268 Code Civ. Proc. § 191.

This provision is not limited to actions, but applies to special proceedings. People ex rel. Manhattan Ry. Co. v. Barker, 152 N. Y. 417.

The effect of a unanimous judgment or order of affirmance is a decision that there is evidence supporting the findings of fact as expressed or necessarily implied. Id.

269 Hoes v. Edison General Electric Co., 150 N. Y. 87; Croveno v. Atlantic Ave. R. Co., 150 N. Y. 225; People ex rel. Public Charities & Correction Com'rs v. Cullen, 151 N. Y. 54.

270 Const. 1894, art. 6, § 9.

271 Sciolina v. Erie Preserving Co., 151 N. Y. 50; Croveno v. Atlantic Ave. R. Co., 150 N. Y. 225.

272 Code Civ. Proc. §§ 198-201.

judge,[273] a reporter who is styled the state reporter,[274] a messenger,[275] a crier, and such other attendants as are necessary, including librarian and stenographers.[276] The clerk, reporter and attendants, are removable by the court.[277] The clerk must keep his office at the seat of government.[278]

§ 155. Associate judges.

Whenever a majority of the judges of the court of appeals certify to the governor that the court is unable, by reason of the accumulation of cases pending therein, to hear and dispose of them with reasonable speed, the governor shall designate not more than four justices of the supreme court to serve as associate judges of the court of appeals.[279] Pursuant to this provision of the constitution, two associate judges of the court of appeals were designated by the governor in 1900.

§ 156. Terms of court.

Terms of the court of appeals must be appointed to be held at such times and places as the court thinks proper, and continued as long as the public interest requires. A term may be appointed to be held in a building, other than that designated by law, and may be adjourned from the place where it is appointed to be held to another place in the same city. One or more of the judges may adjourn a term without day or to a day certain.[280]

§ 157. Rules of court.

Rules of court, regulating the practice and proceedings, and the admission of attorneys to practice, may be made, altered, and amended by the court.[281]

273 Code Civ. Proc. § 202, amended L. 1897, c. 221.
274 Code Civ. Proc. §§ 209-216.
275 L. 1890, c. 26.
276 L. 1871, c. 238, as amended L. 1883, c. 111 and L. 1889, c. 527.
277 Code Civ. Proc. § 198.
278 Const. 1894, art. 6, § 19.
279 Const. 1894, art. 6, § 7, as amended by L. 1900.
280 Code Civ. Proc. §§ 196, 197.
281 Code Civ. Proc. § 193.

§ 158. Quorum and number necessary to a decision.

Five members of the court of appeals constitute a quorum, and the concurrence of four is necessary to a decision.[282]

ART. VII. SUPREME COURT.

(A) SUPREME COURT CONSIDERED AS AN ENTIRETY.

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—— Under constitution 1822.
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(C) APPELLATE DIVISION.

Time when established, § 178.
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282 Const. 1894, art. 6, § 7.

(A) SUPREME COURT CONSIDERED AS AN ENTIRETY.

§ 159. Historical.

The history of the supreme court of the state of New York may be traced back to a very early period in colonial times. In the first Constitution of the state, in 1777, this court was recognized as existing, and the mode of appointment and tenure of office of its judges were prescribed. During the earlier periods of our history as a state, and at the time when the New York reports commence, the supreme court was the leading court of original jurisdiction. Its powers were never precisely defined by law, but it exercised a general jurisdiction, corresponding to that of the King's Bench in England. It was then composed of a chief justice and four puisne justices, who held office during good behavior or until they attained the age of sixty years. Suits for money-demands under twenty pounds in amount, were required to be brought in the inferior courts, and were not to be removed into the supreme court except by writ of error. The justices of the supreme court were required,

at least once a year, in vacations, to hold circuit courts in each of the counties of the state, for the trial of issues joined in the supreme court, or brought into that court to be tried. Issues were in general required to be tried in the counties wherein the lands concerned were situated, or the cause of action arose, or the offence was committed. Each justice was required to return his proceedings at such circuits to the supreme court at its next term, which was to record them, and render the proper judgment. In association with certain local magistrates of the respective counties, the justices held also courts of oyer and terminer, at the same time with the circuits. The proceedings had before the individual justices at the circuits, were, under this form of organization, reviewable before the full bench of justices, and their decisions were in turn the subject of review, on writ of error, in the court of errors.[283]

—— **Under Constitution 1822.** The supreme court, as thus constituted, continued in operation until the new Constitution adopted in 1822 took effect. That instrument, and the legislation enacted for the purpose of carrying its provisions into effect, made important changes in its organization, especially in respect to the trial and determination of issues of fact. The number of justices of which the supreme court proper was composed was reduced to three—a chief and two justices. The state was divided into eight judicial circuits. In each circuit there was a "circuit judge," who held office by the same appointment and tenure with the supreme court justices. He was empowered to try civil causes at nisi prius, to hold the court of oyer and terminer, and also to exercise the functions of a justice of the supreme court at chambers. Power was also vested in these circuit judges to try causes in equity, as vice-chancellors. The proceedings of the circuit judge, acting as a justice of the supreme court at chambers, or in the trial of issues at law, or of criminal causes, were reviewable by the justices of the supreme court, in banc. From the decisions of the circuit judges in equity, an appeal lay to the chancellor.

—— **Under Constitution 1846.** Except that in some of the circuits a change was made in respect to the trial of

283 For the early history of the supreme court, before 1777, see Matter of Steinway, 159 N. Y. 250.

equity causes, the organization of the supreme court continued substantially as above stated until the Constitution of 1846 took effect. By the provisions of that instrument, and of the legislation auxiliary to it, particularly the Judiciary Act of 1847, and the Code of Procedure of 1848, it was provided that there should be one supreme court, having general jurisdiction in law and equity. The state was redivided into eight judicial districts, bounded by county lines, and so arranged as to be as nearly equal as possible in point of population. In each of these districts there were four justices of the supreme court, elected by the people of the district at large. The first district, comprising the city of New York, had one additional justice, in consideration of the accumulation of business there. The court, as thus organized, possessed in general all the common law jurisdiction of the old supreme court, together with the equity powers of the former court of chancery which was thereby abolished. The general features of the mode of transacting business were substantially the same in the different districts. Single justices of the court held circuits in the several counties for the trial of civil causes, courts of oyer and terminer for the trial of the higher crimes, and special terms for the trial of cases of an equitable character by the court alone and without a jury, and for the hearing of motions and petitions and determination of special proceedings in the cases allowed by law. Each justice was also clothed with power to act at chambers in the transaction of a variety of business, both ex parte and upon notice, and including many matters which, under the former English system, and in many of the other States of the Union whose judiciary is modelled upon that of England, are transacted as of course before the clerk. General terms were held from time to time in each district, usually by three justices of the court. At these general terms, appeals were heard from decisions made at special term; and proceedings had upon the trial of causes, at circuit, or oyer and terminer, were reviewed. The phrases "general term" and "special term" were recognized by the Constitution of 1846, as then in current use. They seem to have been introduced by previous rules of court prescribing the time and manner of holding sessions of the court for the transaction of its business.

The supreme court was considered as one court, holden in the eight districts of the state. For some time after the organization of the court, the justices did not in general consider themselves as bound by decisions of the court, even though made at general term, unless made in the district in which they severally belonged. There were therefore, especially prior to 1860, many instances of a conflict of decision between the general terms of different districts. In such cases, the decision of each general term controlled in the district in which it was rendered; but the question was regarded in the other districts as an open one, until at length decided in the court of appeals. At the time of the reorganization of the court of appeals, the organization of the supreme court was again modified, by dividing the state into four departments, and assigning three judges in each to constitute permanently the general term for all the districts therein.[284]

—— **Under Constitution 1894.** The constitution of 1894 introduced several important changes in the judicial system of the state, including the supreme court. The superior court of the city of New York, the court of common pleas for the city and county of New York, the superior court of Buffalo, and the city court of Brooklyn, were abolished, and all actions and proceedings pending in such courts transferred to the supreme court for hearing and determination, and the jurisdiction of such courts was vested in the supreme court, the judges of such courts being converted into justices of the supreme court.[285] Circuit courts and courts of oyer and terminer were abolished and their jurisdiction vested in the supreme court, it being provided that any justice of the supreme court, except as otherwise provided, may hold court in any county.[286] The supreme court is continued with general jurisdiction in law and equity, and a provision made requiring the legislature to divide the state into four judicial departments, of which one was to be the county of New York, and that there be an appellate division of the supreme court, consisting of seven justices in the first department, and of five justices in each of the other

[284] L. 1870, c. 408, p. 947.
[285] Const. 1894, art. 6, § 5.
[286] Const. 1894, art. 6, § 6.

departments, with the jurisdiction previously exercised by the supreme court at its general term, and by the general terms of the courts abolished, and such additional jurisdiction as may be conferred by the legislature.[287]

§ 160. Court of chancery.

Prior to the Revolution, courts of chancery were held in New York by the colonial governors, though with some interruption, and in the face of much opposition on the part of the people and their representatives in the legislature. This opposition, however, does not seem to have been directed against chancery jurisdiction as such but rather against the assumption of judicial powers by the governors. In the Constitution of 1777, the court of chancery was recognized as an existing court, and it was thereafter regularly held by the chancellor, who possessed equity powers coextensive in general with those of the English court of chancery. Under the Constitution of 1822, besides the general equity jurisdiction vested in the chancellor, the circuit judges of the eight circuits into which the state was then divided, were authorized to act as vice-chancellors in their respective circuits. The court of chancery, as thus organized, continued in existence until the reorganization of the judiciary under the Constitution of 1846, when it was abolished and its jurisdiction vested in the supreme court. An appeal lay, in general, to the chancellor, from the decrees of the vice and assistant vice-chancellors. The decisions of the chancellors are reported successively by Johnson, Hopkins, Paige, and Barbour, while those of the vice-chancellors of the first and eighth circuits, and the assistant vice-chancellor of the first circuit, are reported by Edwards, by Clarke, and by Hoffman and Sandford respectively.

§ 161. Civil jurisdiction.

The general jurisdiction in law and equity, which the supreme court of the state possesses, under the provisions of the constitution, includes all the jurisdiction which was possessed

[287] Const. 1894, art. 6, §§ 1, 2.

and exercised by the supreme court of the colony of New York, at any time, and by the court of chancery in England, on the fourth day of July, seventeen hundred and seventy-six, with the exceptions, additions, and limitations, created and imposed by the constitution and laws of the state. Subject to those exceptions and limitations, the supreme court of the state has all the powers and authority of each of those courts, and exercises the same in like manner.[288] Beginning with this broad statement, which is a definition of the powers and jurisdiction of the supreme court only by reference, it is necessary to ascertain its jurisdiction during colonial times. The court was first permanently organized by an act of the colonial legislature in 1697, and from that time, during the whole residue of our existence as a colony, and within the bounds of the colony, it possessed the powers and exercised the jurisdiction, civil and criminal, appellate as well as original, of the court of king's bench in the mother country.[289] The equity jurisdiction vested in the court, being that possessed by the court of chancery in England in 1776, and by the court of chancery as it existed in this state until its abolishment in 1846, includes all cases which may be properly comprehended by established and existing equitable principles, it not being necessary that there be a definite precedent for the action brought.[290] But the equitable jurisdiction thus conferred is not exclusive[291] and the rule of the court of chancery that jurisdiction would not be assumed where the amount involved was less than a hundred dollars no longer exists.[292]

So much for the general jurisdiction of the court. Scattered throughout the Code of Civil Procedure and the statutes are provisions conferring jurisdiction in special cases, which, together with cases where jurisdiction results from the general equitable jurisdiction of the court, are in part as follows:[293]

288 Code Civ. Proc. § 217; Const. 1894, art. 6, § 1.

289 1 Smith's History of New York, append. 6; Kanouse v. Martin, 5 Super. Ct. (3 Sandf.) 653.

290 Youngs v. Carter, 10 Hun, 194.

291 Forrest v. Forrest, 25 N. Y. 501.

292 Marsh v. Benson, 34 N. Y. 358.

293 This list is not complete but embraces the principal cases of which

(a) The court has general supervision over inferior tribunals, and persons acting judicially;[294]

(b) Trusts and trustees (concurrent)[295] which is not taken away because the statute gives another court, such as the county court, jurisdiction over a particular trust such as an assignment for benefit of creditors.[296] Thus the supreme court has concurrent jurisdiction with the surrogate to compel an executor, administrator or guardian to account,[297] but the surrogate's court has exclusive jurisdiction of the probate of wills of personal property;[298]

(c) Writs of habeas corpus to bring up persons to testify (concurrent);[299]

(d) Writs of habeas corpus and writs of certiorari to inquire into the cause of detention (concurrent);[300]

(e) Writ of mandamus;[301]

(f) Writ of prohibition;[302]

(g) Writ of assessment of damages;[303]

(h) Writ of certiorari to review determination of inferior tribunal;[304]

the court has jurisdiction. The jurisdiction in special actions or proceedings will necessarily be considered in the subsequent chapters relating thereto.

[294] LeRoy v. City of New York, 20 Johns. 429; People ex rel. City of New York v. Nichols, 79 N. Y. 583; Matter of Pye, 21 App. Div. 266.

[295] People v. Norton, 9 N. Y. (5 Seld.) 176.

[296] Hurth v. Bower, 30 Hun, 151.

[297] Ludwig v. Bungart, 26 Misc. 247; Steinway v. Von Bernuth, 59 App. Div. 261; Haughian v. Conlon, 39 Misc. 584.

Contra,—Borrowe v. Corbin, 31 App. Div. 172; Matthews v. Studley, 17 App. Div. 303, which held that the supreme court would not entertain a suit for an accounting by executors unless the case had special features showing that a complete remedy could not be had in the surrogate's court, and that its powers needed to be supplemented by the fuller powers of a court of equity. Compare Chipman v. Montgomery, 63 N. Y. 221; Wager v. Wager, 89 N. Y. 161; Strong v. Harris, 84 Hun, 314; Meeks v. Meeks, 34 Misc. 465.

[298] Booth v. Kitchen, 7 Hun, 255.

[299] Code Civ. Proc. §§ 2008-2010.

[300] Code Civ. Proc. § 2017.

[301] Code Civ. Proc. §§ 2068, 2069.

[302] Code Civ. Proc. §§ 2092, 2093.

[303] Code Civ. Proc. § 2104.

[304] Code Civ. Proc. § 2123.

(i) Actions to enforce penalties and forfeitures to the people of the state (concurrent);[305]

(j) All proceedings under the general assignment act (concurrent);[306]

(k) The persons and estates of lunatics, infants and habitual drunkards (concurrent jurisdiction);[307]

(l) Petition for the voluntary dissolution of a corporation (concurrent);[308]

(m) Allowance of sale, mortgage, or leasing of the real estate of a corporation;[309]

(n) Investigation of amount of property held by a religious corporation;[310]

(o) Correction of errors in the determinations of state or county canvassers;[311]

(p) Review of illegal, erroneous, or unequal assessments.[312]

The court has no inherent common law or equitable jurisdiction to declare a marriage contract void, or to decree a limited or an absolute divorce. The jurisdiction is derived solely from the statute.[313]

305 Code Civ. Proc. § 1962.

306 L. 1885, c. 380; Mills v. Husson, 140 N. Y. 99.

307 Code Civ. Proc. § 2320 et seq.; Wilcox v. Wilcox, 14 N. Y. (4 Kern.) 575; Matter of Hubbard, 82 N. Y. 90; L. 1880, c. 423.

The jurisdiction of the supreme court over the person and estate of infants, without regard to age, has not been limited by Code Civ. Proc. § 2827, giving the surrogate's court concurrent jurisdiction, nor by rule 52 of the general rules of practice, which contemplates a petition on the part of the infant, and where the court has, pursuant thereto, appointed the father of an infant over fourteen years of age, guardian of his person and estate, it may, upon notice to both, revoke the appointment, against the wish and without the consent of the infant, and appoint a trust company guardian. Matter of White, 40 App. Div. 165.

308 Code Civ. Proc. § 2419.

309 Code Civ. Proc. § 3391; Madison Ave. Baptist Church v. Baptist Church in Oliver St., 46 N. Y. 131, 137 (religious corporation).

310 L. 1895, c. 723, § 13.

311 L. 1896, c. 909, § 133.

312 L. 1880, c. 269.

313 Peugnet v. Phelps, 48 Barb. 566.

§ 162. Power of legislature to restrict jurisdiction.

The legislature cannot abridge or limit the jurisdiction of the supreme court,[314] but it may take away the remedy by certiorari where a remedy by appeal exists.[315]

§ 163. Judicial districts and departments.

The constitution of 1894 divides the state into four judicial departments. The first department consists of the county of New York; the second department consists of the counties embraced within the present second judicial district; the third department consists of the counties embraced within the present third, fourth and sixth judicial districts; the fourth department consists of the counties embraced within the present fifth, seventh and eighth judicial districts.

The eight judicial districts are arranged as follows:

The first judicial district consists of the city and county of New York:

The second judicial district consists of the counties of Richmond, Suffolk, Nassau, Queens, Kings, Westchester, Orange, Rockland, Putnam and Dutchess:

The third judicial district consists of the counties of Columbia, Sullivan, Ulster, Greene, Albany, Schoharie and Rensselaer:

The fourth judicial district consists of the counties of Warren, Saratoga, Washington, Essex, Franklin, St. Lawrence, Clinton, Montgomery, Hamilton, Fulton and Schenectady:

The fifth judicial district consists of the counties of Onondaga, Oneida, Oswego, Herkimer, Jefferson and Lewis:

The sixth judicial district consists of the counties of Otsego, Delaware, Madison, Chenango, Broome, Tioga, Chemung, Tompkins, Schuyler and Cortland:

[314] Alexander v. Bennett, 60 N. Y. 204; People ex rel. City of New York v. Nichols, 79 N. Y. 582; People ex rel. Hill v. Board of Sup'rs of Wayne County, 49 Hun, 476, 18 State Rep. 898; Getman v. City of New York, 66 Hun, 236, 49 State Rep. 158; Matter of Stilwell, 139 N. Y. 337, 54 State Rep. 491; Mussen v. Ausable Granite Works, 63 Hun, 367, 43 State Rep. 609.

[315] People ex rel. Hill v. Board of Sup'rs of Wayne County, 49 Hun, 476, 18 State Rep. 898.

The seventh judicial district consists of the counties of Livingston, Wayne, Seneca, Yates, Ontario, Steuben, Monroe and Cayuga:

The eighth judicial district consists of the counties of Erie, Chautauqua, Cattaraugus, Orleans, Niagara, Genesee, Allegany and Wyoming.

§ 164. Changing place of trial of actions pending in other courts.

The supreme court, upon the application of either party, may, and in a proper case, must, make an order, directing that an issue of fact joined in an action or special proceeding pending in any other court of record, except the city court of the city of New York, or a county court, be tried at a term of the supreme court in another county, on such terms, and under such regulations as it deems just; and thereupon the issue must be tried accordingly. After the trial the clerk of the county in which it has taken place, must certify the minutes thereof which must be filed with the clerk of the court in which the action or special proceeding is pending. The subsequent proceedings in the last mentioned court must be the same as if the issue had been tried therein.[316]

§ 165. Appointment of term of court.

Before the constitution of 1894, the law provided for the designation of the "justices of the supreme court" of the times and places for holding the ordinary and usual special terms, circuit courts and courts of oyer and terminer in the several judicial departments of the state, and that the governor might, when in his opinion the public interest required, appoint one or more extraordinary general or special terms of the supreme court, or terms of a circuit court or court of oyer and terminer, and "designate the time and place of holding the same." It was held thereunder that there was no limitation in the grant of power to the governor so as to preclude him from designating a time and place already designated by the justices of the

316 Code Civ. Proc. § 218.

supreme court for the holding of a regular term of the court.[317] It was held that these statutes were not merely directory and therefore that courts could not be held at places not designated according to law.[318]

By the constitution of 1894 and section 232 of the Code, the justices of the appellate division in each department are authorized to fix the times and places for holding special and trial terms therein, but if such a designation is not made every two years counting from 1895 the justices of the supreme court for each judicial district, or a majority of them not designated as justices of the appellate division, must fix the time and place.[319] But this provision does not take away the power of the governor to call an extraordinary term,[320] and the fact that his proclamation appoints the holding of an "extraordinary court," instead of an "extraordinary term," is not fatal.[321] At least one special term and two trial terms must be appointed to be held each year in each county separately organized, and two or more trial terms may be appointed to be held at the same time in the same county.[322]

§ 166. Appointing new judge for trial or special term.

If it appear to the satisfaction of the presiding justice of the appellate division in any department that a special or trial term of the supreme court duly appointed therein is in danger of failing, he may designate a justice who resides in that department to hold such term in the absence of the justice assigned thereto. If in the opinion of such presiding justice it is not practicable to make a designation from his department, he shall so inform the governor who may thereupon

317 People v. Shea, 147 N. Y. 78.

318 Northrup v. People, 37 N. Y. 203. See People ex rel. Isaacs v. Warden of District Prisons, 73 Hun, 118, 57 State Rep. 4, as to designation of terms by court of special sessions.

319 People v. Youngs, 151 N. Y. 210; Matter of Rupp, 45 App. Div. 631, 61 N. Y. Supp. 1147. Fulton and Hamilton counties are, for this purpose, to be considered as one county.

320 Code Civ. Proc. § 234. People v. Young, 18 App. Div. 162, 79 State Rep. 772.

321 People v. McKane, 80 Hun, 322.

322 Code Civ. Proc. § 232.

designate for such term a justice from any department.[323] The Code also provides that at the request of the presiding justice of any judicial department the appellate division of either of the other departments may assign from among the trial justices of any judicial district in its department such justices as in its opinion may be spared from said district to hold trial or special terms in the departments from which the request may come.[323a]

§ 167. Place of holding court.

The place appointed within each county for holding a special term of the supreme court, at which issues of fact are triable, or a trial term, must be that designated by the statute for holding the county court,[324] which is the county court house.

§ 168. Number of judges for a special or trial term.

A special term or a trial term of the supreme court must be held by one judge.[325]

§ 169. Removal of inferior judges and officers.

Justices of the peace and judges, and justices of inferior courts, not of record, and their clerks, may be removed, as provided by the constitution, by the supreme court at any general term thereof.[326] Justices of the district court in the city of New York and clerks of said courts may be removed by the appellate division of the supreme court in the first department for any cause for which a police justice or a police clerk in said city may be removed. All existing provisions of law with regard to the removal of such police justices and police clerks are applicable to proceedings for the removal of such district court judges or district court clerks.[327]

323 Code Civ. Proc. § 237.

323a L. 1902, c. 484.

324 Code Civ. Proc. § 238.

325 Code Civ. Proc. § 229; L. 1891, c. 105, § 184, as amended by L. 1899, c. 587 was held unconstitutional in Matter of Rupp, 45 App. Div. 631, 61 N. Y. Supp. 1147, because it provided for a hearing by more than one judge.

326 L. 1847, c. 280, § 25, as amended L. 1880, c. 354.

327 L. 1895, c. 553, § 14, as amended L. 1896, c. 362, and L. 1900, c. 753.

§ 170. Officers of court.

Clerks of the several counties are clerks of the supreme court, with the powers and duties prescribed by law.[328] The justices of the appellate division in each department have power to appoint and to remove a clerk, who keeps his office at a place to be designated by said justices,[329] and have power to appoint and remove a reporter, to whom the original opinions of the court are delivered by the judges immediately after the decisions of the cases in which they are written are made.[330] Stenographers are appointed and may be removed by justices of the supreme court.[331]

§ 171. Place for making and hearing motions.

The place for making and hearing motions in an action in the supreme court, as fixed by the Code, will be treated of in a subsequent chapter relating to motions.[332]

§ 172. Reports.

In 1804 provision was made by statute for the appointment by the supreme court of an official reporter. Under this authority, reports of the decisions of the supreme court, and the court for the correction of errors, were published in regular series, by the reporters appointed from time to time viz., Messrs. Caines, Johnson, Cowen, Wendell, Hill and Denio,—terminating with the reorganization of the judiciary under the Constitution of 1846. Commencing at that time, the decisions of the supreme court in all the districts were systematically reported in the series known as Barbour's Supreme Court Reports, until 1877. In 1869 an act was passed providing for the appointment of a reporter of the supreme court, under which Mr. Lansing commenced the official reporting of a selection of the decisions which continued until 1874. In 1874, Mr. Hun commenced his reports which continued to be known as Hun's reports until the creation of the appellate division in

328 Const. 1894, art. 6, § 19.
329 Const. 1894, art. 6, § 19.
330 Code Civ. Proc. § 220.
331 Code Civ. Proc. § 254 et seq.
332 See post, §§ 594-599, 601.

1896 whereupon they assumed the title of "Appellate Division Reports."

(B) GENERAL AND SPECIAL TERMS.

§ 173. Derivation of names general and special terms.

The names general and special term, originated in the sittings of the justices of the supreme court as constituted before the constitution of 1846. The justices of the court, then three in number, sat in banc to hear such matters as might properly be brought before the whole bench. Such sittings were known as general terms while the terms of the court held by a single judge for the hearing of issues of law and motions were denominated special terms.

§ 174. Only one court.

The supreme court, before the constitution of 1894, was one court, exercising its jurisdiction through the special terms, the circuits, and the general terms,[333] and the same is true since the constitution of 1894, except that the mediums through which jurisdiction is exercised are the appellate divisions, and special and trial terms.

§ 175. Jurisdiction and powers of the general (appellate division) term.

The general term, as it existed prior to 1895, had all the power and all the general jurisdiction of the supreme court, except as limited by statute,[334] and the appellate division created by the constitution of 1894, has the jurisdiction formerly vested in the general terms, though it is not required to, and will not, ordinarily hear motions in the first instance, which is a part of the business of the special term.[335] Thus, the old general term might modify a judgment of the special term so as to give true expression to it [336] but it was deemed the better

[333] Syracuse Sav. Bank v. Syracuse, C. & N. Y. R. Co., 88 N. Y. 110; Tracy v. Talmadge, 1 Abb. Pr. 460.

[334] Folger v. Fitzhugh, 41 N. Y. 228; Syracuse Sav. Bank v. Syracuse, C. & N. Y. R. Co., 88 N. Y. 110.

[335] Matter of Pye, 21 App. Div. 266; Matter of Barkley, 42 App. Div. 597. General term, from reasons of expediency, generally refuses to act when special term has the power. Anonymous, 10 How. Pr. 353.

[336] Salmon v. Gedney, 75 N. Y. 479.

practice to first move at special term.[337] The circuit court, which was abolished by the constitution of 1894, had no equitable jurisdiction, except so far as such jurisdiction was necessary for the trial of equitable defenses to common law actions, and hence could not render a judgment equitable in its nature, in favor of plaintiff.[338] The Code provides, in many places, that certain proceedings, shall be before the general term or appellate division, while others shall be before the special term. These provisions will be noticed in detail in considering the matters to which the proceedings relate. For instance, it provides that the trial judge, in a jury case, may himself hear a motion for a new trial or may, in his discretion, at any time during the term, order the exceptions taken to be heard in the first instance, on a motion for a new trial, by the appellate division of the supreme court,[339] and where, an interlocutory judgment is directed on a trial by a court without a jury, or by a referee, and further proceedings must be taken before a final judgment can be entered, a motion for a new trial, on one or more exceptions, may be made to the appellate division, after the entry of the interlocutory judgment, and before the commencement of the hearing directed therein.[340]

§ 176. Jurisdiction and powers of the special term.

All the powers of the supreme court, other than appellate powers and the trial of issues of fact with a jury, may be exercised by a special term, unless otherwise provided for by statute. Some of the special terms appointed by the justices of the supreme court in each judicial department are designated as, "special terms for equity cases and enumerated motions," and others as, "special terms for non-enumerated motions and chamber business." It has been held, however, that

337 See Davis v. Duffie, 21 Super. Ct. (8 Bosw.) 691, 4 Abb. Pr., N. S., 478, which so holds in regard to the superior court of the city of New York.

338 Simis v. McElroy, 20 Civ. Proc. R. (Browne) 288; Colville v. Chubb, 20 Civ. Proc. R. (Browne) 352.

339 Code Civ. Proc. §§ 999, 1000.

340 Code Civ. Proc. § 1001.

the designation of a special term as one for, "non-enumerated motions and chamber business" does not limit the power of the justice to consider any proceedings proper to be heard at special term.[341]

——**Enumerated and contested motions.** Enumerated motions are motions arising on special verdict, issues of law, cases, exceptions, appeals from judgments sustaining or overruling demurrers, appeals from judgment or order granting or refusing a new trial in an inferior court, appeals by virtue of sections 1346 and 1349 of the Code, agreed cases submitted under section 1279 of the Code, and appeals from final orders and decrees of surrogates' courts, and matters provided for by sections 2085-2099 and 2138 of the Code. Non-enumerated motions include all other questions submitted to the court, and shall be heard at special term except when otherwise directed by law. Contested motions cannot be noticed or brought to a hearing at any special term held at the same time and place with a trial term, except in actions upon the calendar for trial at such term, and in which the hearing of the motion is necessary to the disposal of the cause, unless otherwise ordered by the justice holding the court; and except, also, that in counties in which no special term distinct from a trial term is appointed to be held, motions in actions triable in any such county may be noticed and brought on at the time of holding the trial and special term in the county in which such actions are triable.[342]

The provision that contested motions shall not be noticed or brought to a hearing at any special term held at the same time and place with a circuit, may be construed as referring alone to those incidental applications, ordinarily denominated motions, which are made during the progress of an action or special proceeding, after its commencement, and not as embracing an application which is the foundation of a statutory remedy. Its object is to prevent interference with the ordinary work of a trial term by the interjection of motion business bearing no relation to cases on the calendar, and also to prevent the inconvenience to counsel of being compelled to

[341] People ex rel. City of New York v. Nichols, 58 How. Pr. 200.
[342] Rule 38 of General Rules of Practice.

attend a special term held in connection with a trial term, on motions in outside cases, where the hearing might be delayed by the regular calendar business. The rule does not exclude a judge at special term who is engaged at the same time in holding a circuit from entertaining a motion, noticed for such term, if, in his judgment, the circumstances and the rights and interests involved render it proper that he should do so. The judge may refuse to hear a contested motion at such a term on the ground that it was irregularly noticed, but if he chooses to exercise the jurisdiction as a judge of a special term to dispose of any non-enumerated business, the rule constitutes no limitations on his power.[343]

A motion for judgment on the pleadings, on the ground that no issue of fact is raised, is a non-enumerated motion,[344] as is a motion to bring on a certiorari to review,[345] or a motion to set aside a referee's report for irregularities.[346]

——**Review of judgments or orders of the general term.** A judgment of the general term cannot be reviewed, modified, or changed in any manner on the merits, by the special term,[347] nor can a motion to correct a judgment be made before the special term, except by permission of the general term,[348] but in all cases of irregularity, or where the merits are not passed on, a motion may be made at the special term.[349] Thus a special term may relieve from a default judgment[350] or set aside

[343] Matter of Argus Co., 138 N. Y. 557; Skinner v. Hannan, 81 Hun, 376.

[344] People v. Northern R. Co., 42 N. Y. 217.

[345] People ex rel. City of New York v. Nichols, 58 How. Pr. 200.

[346] Foden v. Sharp, 4 Johns. 183.

[347] Sheldon v. Williams, 52 Barb. 183; Jones v. Merchants' Nat. Bank, 10 State Rep. 70.

[348] Marshall v. Boyer, 52 Hun, 181, 23 State Rep. 302.

[349] Ayres v. Covill, 9 How. Pr. 573; Corning v. Powers, 9 How. Pr. 54.

[350] Ayres v. Covill, 9 How. Pr. 573.

When plaintiff in an action in the supreme court is entitled to judgment upon the failure of defendant to answer, and the relief demanded requires application to be made to the court, such application may be made at any special term in the district embracing the county in which the action is triable, or, except in the first district, in an adjoining county; such application, except in the first judicial dis-

an irregular order of the general term,[351] or correct a clerical mistake,[352] or stay proceedings on a judgment of the general term allowing a redemption, and extend the time therefor, until a decision by the court of appeals;[353] but whether a judgment of the general term expresses the intent of the court, cannot be passed on by the special term.[354]

—— **Application for judgment on referee's report.** An application for judgment on the report of a referee, should be made at special term, notwithstanding the judgment of the special term has been modified by the general term so as to send the case back to the referee to consider one particular subject, concerning which the report was made.[355]

—— **Motion for new trial or hearing.** A motion for a new trial "must," in the first instance, be heard and decided at the special term, except as specially provided for by the Code.[356] In an action triable by the court, where a reference has been made to report on one or more specific questions of

trict, may also be made at a trial term in the county in which the action is triable. When a reference or writ of inquiry shall be ordered, the same shall be executed in the county in which the action is triable, unless the court shall otherwise order. In the first judicial district, every motion or application for an order or judgment, where notice is necessary, must be made to the special term for the hearing of motions, and where notice is not necessary, to the special term for the transaction of ex parte business, except where other provision is expressly made by law, or the general or special rules of practice. In the county of Kings all such applications shall be made at the special term for the hearing of motions. Any order or judgment granted in violation of this provision shall be vacated by the special term at which the application should have been made, or by the appellate division of the supreme court; and no order or judgment granted in violation of this rule shall be entered by the clerk.—Rule 26 of General Rules of Practice.

351 Jay v. DeGroot, 1 Hun, 118.

352 Morrison v. Metropolitan El. Ry. Co., 60 App. Div. 180.

353 Gray v. Green, 14 Hun, 18, which says, "The general and special term each constitutes a department of the same court. Yet in some particulars, the jurisdiction is concurrent, and it is a little difficult to define the exact boundary between the two jurisdictions."

354 Caro v. Metropolitan El. R. Co., 64 How. Pr. 225, 2 Civ. Proc. R. (Browne) 371.

355 Gautier v. Douglas Mfg. Co., 39 Hun, 642.

356 Code Civ. Proc. § 1002.

fact, a motion for a new hearing "may" be made at a special term.[357]

—— **State writs.** The questions as to whether an application for a state writ, such as habeas corpus, certiorari, mandamus, prohibition, or writ of assessment of damages, should be made to a special term or to the appellate division, will be fully considered in subsequent chapters relating to such writs. It may, however, be stated generally that application must be made to a special term except where the action of the special term, or one or more judges of the supreme court, is sought to be interfered with.

§ 177. Adjournment of special term to chambers.

A special term may be adjourned to the chambers of the judge holding it,[358] and an action triable by the court, without a jury, which was upon the calendar of the term before it was adjourned, may be tried at a term so adjourned, and held at chambers, by consent of both parties, but not otherwise.[359] It should be noticed, however, that in the districts of the supreme court, where the judge, in acting at chambers, also holds in the same room a special term for the hearing of non-enumerated motions, there is notwithstanding, a clear division between the judges' chambers and the special term.[360]

(C) APPELLATE DIVISION.

§ 178. Time when established.

The appellate division of the supreme court in each judicial department, consisting of seven justices in the first department and of five justices in each of the other departments, came into existence in 1896.[361] It is practically the same as the former general term and decisions as to the general term will be considered in connection with statutory provisions relating to the appellate division.

[357] Code Civ. Proc. § 1004.

[358] Code Civ. Proc. § 239; First Nat. Bank v. Hamilton, 50 How. Pr. 116; Lathrop v. Clapp, 40 N. Y. 328.

[359] Code Civ. Proc. § 239.

[360] Bates v. United Life Ins. Ass'n, 68 Hun, 144.

[361] Code Civ. Proc. § 220.

§ 179. Quorum—Before Constitution 1894.

It was necessary, before the constitution of 1894, that at least two judges concur in any judgment rendered at general term,[362] but it was no objection that the third judge died before the decision,[363] and if one judge was disqualified or absent, the other two might hold court.[364] While it was the better practice for the three justices of the general term who heard an appeal to meet and confer, before rendering a decision, the fact that an appeal was decided by two of the justices who heard it, without consultation with the third, did not render the decision invalid.[365] It was not necessary that an appeal be sent to another department of the general term, where two of the justices were incapable of sitting, and two justices from another department were present and sat in the case.[366]

—— **Under Constitution 1894.** Under the constitution of 1894, in each department four of the justices of the appellate division of the supreme court constitute a quorum, and the concurrence of three justices is necessary to pronounce a decision. If three do not concur in a decision, a reargument must be ordered.[367]

§ 180. Number of judges to sit.

No more than five justices shall sit in any case.[368]

§ 181. Residence of justices.

A majority of the justices designated to sit in the appellate division in each department must be residents of the departments.[369]

362 Matter of Kings' County El. R. Co., 78 N. Y. 383; Lusk v. Smith, 8 Barb. 570.

363 Campbell v. Seaman, 63 N. Y. 568.

364 VanRensselaer v. Witbeck, 2 Lans. 498.

365 Parrott v. Knickerbocker Ice Co., 8 Abb. Pr., N. S., 234, 38 How. Pr. 508, 31 Super. Ct. (1 Sweeny) 533.

366 Matter of Broadway Widening, 63 Barb. 572.

367 Const. 1894, art. 6, § 2; Code Civ. Proc. §§ 220, 230.

368 Code Civ. Proc. § 220.

369 Const. 1894, art. 6, § 2; Code Civ. Proc. § 220.

§ 182. Transfer of causes from one department to another.

Whenever the appellate division in any department is unable to dispose of its business within a reasonable time, a majority of the presiding justices of the several departments at a meeting called by the presiding justice of the department in arrears, may transfer any pending appeals from such department to any other department for hearing and determination.[370]

Where in any case four justices of the appellate division in any department are not qualified to sit therein, or where the justices qualified to hear the appeal are equally divided, the court must direct the same to be sent to another department to be specified in the order to be there heard and determined. Where in any case when an appeal to the appellate division of any department comes on for argument, and the justice before whom the action was tried or who granted the order appealed from, is a member of such appellate division, the appellant may make an application to such appellate division for, and the court may grant, an order directing that such appeal be sent to an adjoining department to be specified in the order, to be there heard and determined.[371]

§ 183. How justices are chosen.

From all the justices elected to the supreme court the governor designates those who shall constitute the appellate division in each department, and he designates the presiding justice thereof who acts as such during his term of office. From time to time, as the terms of such designations expire, or vacancies occur, the governor makes new designations, and may also make temporary designations in case of the absence or inability to act of any justice in the appellate division.[372]

—— **Presiding justice.** If the presiding justice is not present at the sitting of the appellate division, the associate justice residing in the department having served the longest time as such, or, if two are present who have served the same length

[370] Const. 1894, art. 6, § 2; Code Civ. Proc. § 220.
[371] Code Civ. Proc. § 231.
[372] Const. 1894, art. 6, § 2; Code Civ. Proc. § 220.

of time, the elder of them must act as presiding justice until a presiding justice attends.[373]

§ 184. Terms of court.

The terms of the appellate divisions of the supreme court are to be appointed by the appellate division in each department, and are held at such times and places, and continue so long, as the appellate division deems proper.[374] An appointment of a term or terms of an appellate division must be made and filed in the office of the secretary of state at least thirty days before the commencement of such term or terms.[375]

§ 185. Place of holding court.

The appellate division is located in the first department, in the city of New York; in the second department, in the city of Brooklyn; in the third department, in the city of Albany; and in the fourth department, in the city of Rochester; but terms thereof may be held elsewhere in such departments, whenever in the discretion of the justices thereof, respectively, public interest may require.[376]

§ 186. Jurisdiction of court.

The appellate division has the jurisdiction formerly exercised by the supreme court at its general terms, and by the general terms of the court of common pleas for the city and county of New York, the superior court of the city of New York, the superior court of Buffalo and the city court of Brooklyn, and such additional jurisdiction as may be conferred by the legislature.[377] It has power to vacate or modify, without notice, or upon such notice as it deems proper, any order in an action or special proceeding made by a justice of the supreme court or by the court without notice to the adverse party; it may grant a stay of proceedings upon any judgment

373 Code Civ. Proc. § 228.
374 Const. 1894, art. 6, § 2; Code Civ. Proc. § 225.
375 Code Civ. Proc. § 226.
376 Code Civ. Proc. § 220.
377 Id.

or order of the supreme court from which an appeal is pending, and may grant any order or provisional remedy which has been applied for without notice to the adverse party, and refused by the supreme court or a justice thereof.[378]

§ 187. Powers of justices.

The Constitution of 1894 provides that no justice of the appellate division shall exercise any of the powers of a justice of the supreme court, other than those of a justice out of court, and those pertaining to the appellate division, or to the hearing and decision of motions submitted by consent of counsel. The purpose of the constitution was to absolutely divorce the justices of the appellate division from all connection with the trial courts, except as to motions submitted by consent of counsel, and the command of the constitution is clear and imperative. The jurisdiction exercised by justices of the supreme court in trial and special terms ceased upon their becoming justices of the appellate division.[379] Hence a justice of the appellate division has no power, even by consent of counsel, to receive the verdict of a jury at a trial term of the supreme court.[380]

(D) APPELLATE JURISDICTION.

§ 188. Scope of subdivision.

The appellate jurisdiction of the appellate division of the supreme court, is set forth in the Code. Such statutory provisions are herein set forth but the right to appeal from a particular order or judgment, or an order or judgment in a particular action or proceeding, will be treated of in subsequent chapters dealing therewith. Appellate practice is not within the scope of this volume.

§ 189. Jurisdiction of general term as appellate court.

The general term, considered as an appellate court, stood in the same relation to the special term as an appellate court

[378] Code Civ. Proc. § 1348.
[379] Const. 1894, art. 6, § 2.
[380] French v. Merrill, 27 App. Div. 612.

does to courts of original jurisdiction.[381] It might review any proceedings in the court where the power was given generally to the supreme court, and was not by statute confined to the special term,[382] and hence could modify a judgment of the special term dismissing a complaint absolutely.[383]

§ 190. Appeals from inferior courts.

Except appeals from inferior and local courts which were previously heard in the court of common pleas for the city and county of New York, and the superior court of Buffalo, an appeal may be taken to the appellate division of the supreme court, from a final judgment, rendered by a county court, or by any other court of record possessing original jurisdiction, where an appeal therefrom to a court other than the supreme court is not expressly given by statute, and upon such appeal, an order granting or refusing a new trial for any of the causes mentioned in section 999 of the Code, made by any of said courts, and questions of facts, may be reviewed in the same manner and to the same extent as questions of fact may be reviewed, upon appeal to the appellate division of the supreme court from a final judgment and order, granting or refusing a new trial, rendered by the same court. Appeals from inferior and local courts which, prior to 1896, were heard in the court of common pleas for the city and county of New York and the superior court of Buffalo, may be taken to the supreme court.[384] An appeal may also be taken from an order affecting a substantial right, made by the court or a judge, in an action brought in, or taken by appeal to, such a court.[385]

—— **Tribunal to hear appeals.** An appeal must be heard by the appellate division of the supreme court, except that appeals from the judgment of any district court or of the city court in the city of New York, may be heard by the appellate division of the supreme court, or by such justice or justices of the supreme court as may be designated for that purpose by

381 Harris v. Clark, 10 How. Pr. 415.
382 Matter of Com'rs of Central Park, 61 Barb. 40.
383 Loeschigk v. Addison, 30 Super. Ct. (7 Rob.) 506.
384 Code Civ. Proc. § 1340.
385 Code Civ. Proc. § 1342.

the justices of the appellate division sitting in the first judicial department. In case an appeal is heard by a justice or justices of the supreme court as hereinbefore provided, the justice or justices by whom such appeal was determined, may allow an appeal to be taken to such appellate division from such determination; and appeals from inferior courts heretofore heard by the superior court of Buffalo shall be heard by the appellate division of the supreme court in the fourth judicial department, or by such justice or justices of the supreme court as may be designated for that purpose by the justices of the appellate division of the fourth judicial department.[386]

§ 191. Appeals from judgment of trial or special terms.

An appeal may be taken to the appellate division of the supreme court from a final judgment rendered in the supreme court as follows: 1. Where the judgment was rendered upon a trial by a referee, or by the court without a jury, the appeal may be taken upon questions of law, or upon the facts, or upon both. 2. Where the judgment was rendered upon the verdict of a jury, the appeal may be taken upon questions of law.[387]

—— **Appeal from interlocutory judgment.** An appeal may also be taken to the appellate division of the supreme court from an interlocutory judgment rendered at a special term or trial term of the supreme court, or entered upon the report of a referee.[388]

—— **Appeal from order.** An appeal may be taken to the appellate division of the supreme court from an order made at a special term or trial term of the supreme court, in either of the following cases:

1. Where the order grants, refuses, continues or modifies a provisional remedy; or settles or grants or refuses an application to resettle a case on appeal or a bill of exceptions.

2. Where it grants, or refuses a new trial; except that where specific questions of fact, arising upon the issues, in an

[386] Code Civ. Proc. § 1344. The "appellate term" is the name given to the term held by a part of the justices in the first department.

[387] Code Civ. Proc. § 1346.

[388] Code Civ. Proc. § 1349. This provision was first introduced in 1893. Bullion v. Bullion, 73 Hun, 437.

action triable by the court, have been tried by a jury, pursuant to an order for that purpose, as prescribed in section nine hundred and seventy-one of this act, an appeal cannot be taken from an order, granting or refusing a new trial upon the merits.

3. Where it involves some part of the merits.[389]

4. Where it affects a substantial right.[390]

[389] As all orders in the progress of a cause necessarily, in some degree, affect the merits, so all are the subject of an appeal, unless they relate merely to matters of practice and procedure, or rest in that discretion which is not and cannot be governed by any fixed principle or rules.—Cruger v. Douglass, 8 Barb. 81, 2 Code R. 123.

Order refusing leave to reply, after the time to reply is passed, does not involve the merits. Thompson v. Starkweather, 2 Code R. 41.

[390] An order denying a motion to strike out a pleading as frivolous is not appealable, for it does not involve a substantial right of the applicant, although if such a motion were granted erroneously, the adverse party might appeal, because, by the erroneous striking out of his pleading, he would lose a substantial right.—Crucible Co. v. Steel Works, 9 Abb. Pr., N. S., 195, 57 Barb. 447.

An order allowing an amendment of a complaint by the insertion of a new cause of action, or the allowing an amendment of an answer, by setting up a new defense, affects a substantial right.—Harrington v. Slade, 22 Barb. 161; Sheldon v. Adams, 27 How. Pr. 179, 18 Abb. Pr. 405; Union Bank v. Mott, 19 How. Pr. 267, 11 Abb. Pr. 42.

Order denying motion for judgment on the pleadings for a sum admitted to be due, affects a substantial right.—Marsh v. West, Bradley & Cary Mfg. Co., 46 Super. Ct. (14 J. & S.) 8.

Refusal to require party to receive a pleading, involves a substantial right.—Pattison v. O'Connor, 23 Hun, 307, 60 How. Pr. 141.

An order giving leave to sue on a judgment between the same parties, affects a substantial right.—Hanover Fire Ins. Co. v. Tomlinson, 58 N. Y. 215.

The right to a preference of the cause by placing it on the short cause calendar, is a substantial right.—Buell v. Hollins, 16 Misc. 551.

An order refusing to vacate a notice of lis pendens as void on its face does not affect a substantial right.—Jaffray v. Brown, 17 Hun, 575.

An order for the removal of a cause is appealable, as affecting a substantial right (DeHart v. Hatch, 3 Hun, 375, 6 Thomp. & C. 186), and the same rule applies to a refusal to remove (Fargo v. McVicker, 38 How. Pr. 1).

An order requiring a complaint or answer to be made more definite and certain, does not ordinarily affect a substantial right, and hence is not appealable, but where leave is given, in case of failure to amend,

5. Where, in effect, it determines the action, and prevents a judgment, from which an appeal might be taken.

6. Where it determines a statutory provision of the state to be unconstitutional; and the determination appears from the reasons given for the decision thereupon, or is necessarily implied in the decision. An order, made upon a summary application, after judgment, is deemed to have been made, in the action, within the meaning of this section.[391]

An appeal may also be taken to the appellate division of the supreme court, from an order, made in an action upon notice, by a judge or justice, out of court, in a case where an appeal might have been taken, if the order had been made by the court.[392]

—— **Scope of review.** Where final judgment is taken, at a special term or trial term, or pursuant to the directions of a referee, after the affirmance, upon an appeal to the appellate division of the supreme court of an interlocutory judgment or after the refusal by the appellate division of a new trial, either upon an application, made, in the first instance, at a term of the appellate division, or upon an appeal from an order of the special term, or of the judge, before whom the issues, or questions of fact were tried by a jury; an appeal to the appellate division, from the final judgment, brings up for review, only the proceedings to take the final judgment, or upon which the final judgment was taken, including the hearing or trial of the other issues in the action, if any.[393]

§ 192. Appeal from determination in special proceeding.

An appeal may be taken to the appellate division from an order affecting a substantial right, made in a special proceeding, at a special term or a trial term of the supreme court; or made by a justice thereof in a special proceeding instituted before him, pursuant to a special statutory provision; or in-

to apply for a judgment, a substantial right is affected. Hughes v. Chicago, M. & St. P. Ry. Co., 45 Super. Ct. (13 J. & S.) 114; Peart v. Peart, 48 Hun, 79. For other authorities, see 1 Abb. Cyc. Dig. 418.

391 Code Civ. Proc. § 1347.

392 Code Civ. Proc. § 1348.

393 Code Civ. Proc. § 1350.

stituted before another judge and transferred to, or continued before him.[394]

—— **From determination of other court.** An appeal may also be taken to the appellate division from such an order made by any court of record possessing original jurisdiction, or a judge thereof, in a special proceeding, but not where an appeal from the order to a court other than the appellate division of the supreme court, is expressly given by statute.[395]

—— **Scope of review.** The appeal brings up for review any preceding order made in the course of the special proceeding, involving the merits, and necessarily affecting the final order appealed from, which is specified in the notice of appeal.[396]

ART. VIII. COUNTY COURTS.

Historical, § 193.
—— Under Constitution of 1846.
—— Under Constitution of 1870.
—— Under Constitution of 1894.
Jurisdiction, § 194.
—— Court of limited jurisdiction.
—— Naturalization proceedings.
—— Foreclosure of mechanic's lien.
—— Proceedings under assignment for benefit of creditors.
—— Equitable actions.
—— When domestic corporation is deemed a resident.
Powers of county court—Same as those of supreme court, § 195.
—— Control of judgment or order.
—— Powers over docketed judgment of justice of the peace.
—— Power to order hearing of exceptions in first instance in supreme court.

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[394] Code Civ. Proc. § 1356.

A proceeding to vacate or correct an award of arbitrators, (Matter of Poole, 5 Civ. Proc. R. [Browne] 279,) or an application by an imprisoned debtor for his discharge (Matter of Brady, 69 N. Y. 215), or proceedings relating to assessment and condemnation proceedings, (Matter of City of Utica, 73 Hun, 256), or mandamus proceedings (People ex rel. Merriam v. Schoonmaker, 19 Barb. 657), are special proceedings within the rule.

[395] Code Civ. Proc. § 1357.

[396] Code Civ. Proc. § 1358.

§ 193. Historical.

County courts were first established in 1691 under the name of courts of common pleas. The court originally consisted of one judge with three justices, in each county, three of whom constituted a quorum. The courts remained substantially the same until the establishment of the state government and up to the time of the Revised Statutes in 1830, when they were continued, but with five judges.[397]

—— **Under Constitution of 1846.** The constitution of 1846 provided that there should be elected in each county, except the city and county of New York, a county judge, who should hold the county court, and perform the duty of surrogate, except that in counties having a population exceeding 40,000, the legislature might provide for the election of a separate officer to perform the duties of the office of surrogate.

—— **Under Constitution of 1870.** The county courts were continued by the constitution of 1870 with the same powers and jurisdiction previously possessed.

[397] The history of the jurisdiction of county courts is gone into quite extensively in Howard Iron Works v. Buffalo Elevating Co., 81 App. Div. 386.

—— **Under Constitution of 1894.** The constitution of 1894 continues the existing county courts, with the same powers and jurisdiction, except that they are granted original jurisdiction in actions for the recovery of money only, where the defendants reside in the county, and the complaint demands judgment for not more than two thousand dollars. It is also provided that the legislature may enlarge or restrict the jurisdiction, provided that no action be authorized therein for the recovery of money only, in which more than two thousand dollars is demanded, or in which any person not a resident of the county is a defendant. The jurisdiction of the courts of sessions which are thereby abolished, except in the county of New York, is vested in the county court.[398] But the provision prohibiting the legislature from extending the jurisdiction so as to authorize an action for the recovery of money only, against a non-resident of the county, applies to actions and not to special proceedings.[399]

§ 194. Jurisdiction.

The court of common pleas, up to the time of the constitution of 1846, possessed general common law jurisdiction, and also jurisdiction of certain special proceedings expressly conferred by statute. The constitution of 1846 limited the jurisdiction by providing that the county court should have jurisdiction in cases arising in justice's court and in "special cases" such as the legislature might prescribe, but that it should have no original civil jurisdiction, except in such "special cases." The legislature was also authorized to confer equity jurisdiction, in special cases, upon the "county judge."[400] Statutes were passed, in pursuance of such constitutional provision, giving the county court jurisdiction of nearly all the common law actions, where the amount in controversy was within a designated sum, but the court of appeals held that the term "special cases" did not refer to common law actions, but to special proceedings, and that therefore the statutes were uncon-

[398] Const. 1894, art. 6, § 14.
[399] Matter of Folts St., 18 App. Div. 568.
[400] Const. 1846, art. 6, § 14.

stitutional in so far as they gave the county courts original jurisdiction of common law actions.[401] The appellate jurisdiction extended to appeals from justices of the peace.

The Code of Procedure fixed the jurisdiction as including (1) exclusive power to review a civil judgment within county, of justice of the peace or a justice court in a city; (2) action to foreclose or satisfy mortgage, where premises are situated within the county; (3) partition of real property, situated within the county; (4) admeasurement of dower in real property situated within the county; (5) sale of infant's real property where within the county; (6) compelling specific performance of contract made by a party since deceased; (7) care and custody of person and estate of lunatic or habitual drunkard; (8) mortgage or sale of property of religious corporation; (9) revival of judgments of late courts of common pleas and authority over justice's judgments where transcripts have been filed with the county clerk; (10) the former jurisdiction of the common pleas in attachment proceedings, voluntary assignments, etc.; (11) remission of fines and forfeited recognizances.[402] The constitution of 1870 extended the original jurisdiction to all cases where the damages claimed did not exceed $1000, where the defendants resided in the county, and it provided that other original jurisdiction might be conferred by the legislature; but it was held thereunder that the power to confer other jurisdiction did not authorize the legislature to extend the jurisdiction to other parties or greater amounts, and that Laws 1880, c. 480, increasing the limit of amount, was unconstitutional.[403]

The Code of Civil Procedure extended the jurisdiction of each county court to the following actions and special proceedings, in addition to the jurisdiction, power and authority, conferred upon a county court, in a particular case, by special statutory provisions:

1. To an action for the partition of real property; for dower; for the foreclosure, redemption or satisfaction of a mortgage

401 Kundolf v. Thalheimer, 12 N. Y. (2 Kern.) 593; Griswold v. Sheldon, 4 N. Y. (4 Comst.) 581.

402 Code Civ. Proc. § 30.

403 Buckhout v. Rall, 28 Hun, 484, 2 Civ. Proc. R. (Browne) 442.

upon real property; or to procure a judgment requiring a specific performance of a contract, relating to real property; where the real property to which the action relates, is situated within the county; or to foreclose a lien upon a chattel, where the lien does not exceed one thousand dollars in amount, and the chattel is found within the county. Thus, the court has jurisdiction of an action to compel the satisfaction of a mortgage which defendant is seeking to enforce after its assignment to him and his agreement to pay it,[404] or an action to enforce specific performance of a contract for sale of lands,[405] but it has no jurisdiction of an action to reform a mortgage,[406] except where the reformation is strictly incidental to the main relief sought.[407]

2. To an action in favor of the executor, administrator or assignee of a judgment creditor, or in a proper case, in favor of the judgment creditor, to recover a judgment for money remaining due upon a judgment rendered in the same court.[408]

3. To an action for any other cause, where the defendant is, or, if there are two or more defendants, where all of them are, at the time of the commencement of the action, residents of the county, and wherein the complaint demands judgment for a sum of money only, not exceeding two thousand dollars; or to recover one or more chattels, the aggregate value of which does not exceed one thousand dollars with or without damages for the detention thereof.[409] The limitation as to the amount relates solely to common law actions for the recovery of money only, and hence does not apply to an action to foreclose a mortgage so as to prevent a deficiency decree in excess

404 Mosher v. Campbell, 30 Hun, 230.

405 Adams v. Ash, 46 Hun, 105, 11 State Rep. 618.

406 Avery v. Willis, 24 Hun, 548; Thomas v. Harmon, 46 Hun, 75, 11 State Rep. 79.

407 Mead v. Langford, 56 Hun, 279, 18 Civ. Proc. R. (Browne) 293, 30 State Rep. 450.

408 A county court has jurisdiction of an action on a judgment of a justice of the peace of the county against a resident thereof. Fink v. Shoemaker, 33 Misc. 687.

409 Heffron v. Jennings, 66 App. Div. 443 holds that an amendment will not be allowed on the trial to reduce the amount of damages claimed to $2,000.

of the statutory limit.[410] This money limitation applies to a cause of action set out in the complaint but does not apply to a cause of action set up by a defendant as a counterclaim.[411] The clause conferring jurisdiction where the action is to recover chattels is not governed by the preceding clause in regard to the defendants being residents of the county, so as to preclude an action to recover chattels as against parties not residents of the county.[412]

4. To the custody of the person and the care of the property, concurrently with the supreme court, of a resident of the county, who is incompetent to manage his affairs, by reason of lunacy, idiocy or habitual drunkenness; and to every special proceeding which the supreme court has jurisdiction to entertain, for the appointment of a committee of the person or of the property of such an incompetent person or for the sale or other disposition of the real property situated within the county of a person, wherever resident, who is so incompetent for either of the reasons aforesaid, or who is an infant; or for the sale or other disposition of the real property situated within the county of a domestic religious corporation.[413]

The jurisdiction conferred upon county courts, in respect to the care and custody of habitual drunkards, is general, being restricted only to cases of persons residing within the county.[414]

—— **Court of limited jurisdiction.** The county court is a court of a limited statutory jurisdiction, except as otherwise prescribed by statute as in assignment proceedings for the benefit of creditors.[415]

[410] Hawley v. Whalen, 64 Hun, 550.

[411] Howard Iron Works v. Buffalo Elevating Co., 68 N. E. 66.

[412] Peck v. Dickey, 5 Misc. 95.

[413] Code Civ. Proc. § 340.

L. 1870, c. 467, § 1, conferring jurisdiction on county courts in civil suits up to $3,000, was repealed by L. 1877, c. 417, § 1, p. 44, and L. 1880, c. 245, § 1, p. 46 and amended by L. 1880, c. 480 which was held unconstitutional in Lenhard v. Lynch, 62 How. Pr. 56, and repealed by L. 1896, c. 548.

[414] Davis v. Spencer, 24 N. Y. 386.

[415] Matter of Witmer, 40 Hun, 64; Peck v. Dickey, 5 Misc. 95; DeBevoise v. Ingalls, 88 Hun, 186, 68 State Rep. 423; Frees v. Ford, 6 N. Y. (2 Seld.) 176; Buckhout v. Rall, 28 Hun, 484; Thomas v. Harmon, 122 N. Y. 84.

—— **Naturalization proceedings.** The county court has jurisdiction in naturalization proceedings, as a court of common law jurisdiction.[416]

—— **Foreclosure of mechanic's lien.** A county court has jurisdiction of an action to foreclose a mechanic's lien on property situated in the county, although the defendant does not reside therein.[417]

—— **Proceedings under assignment for benefit of creditors.** The county court may exercise all the powers of a court of equity in respect to estates assigned for the benefit of creditors,[418] and has jurisdiction of an action by the assignee to recover back the amount of an overpayment to a preferred creditor.[419]

—— **Equitable actions.** The county court has not jurisdiction of an equitable action to enforce contribution among stockholders.[420]

—— **When domestic corporation is deemed a resident.** For the purpose of determining the jurisdiction of a county court, a domestic corporation or joint-stock association, whose principal place of business is established, by or pursuant to a statute, or by its articles of association, or is actually located within the county, or in case of a railroad corporation where any portion of the road operated by it is within the county, is deemed a resident of the county; and personal service of a summons, made within the county, or personal service of a mandate, whereby a special proceeding is commenced, made within the county, is sufficient service thereof upon a domestic corporation wherever it is located.[421] The county court has

416 People ex rel. Smith v. Pease, 30 Barb. 588.

417 Raven v. Smith, 148 N. Y. 415.

418 Matter of Bonner, 8 Daly, 75; Matter of Friedman, 8 Wkly. Dig. 99.

419 Otis v. Crouch, 89 Hun, 548, 69 State Rep. 646.

420 Koons v. Martin, 66 Hun, 554, 49 State Rep. 866.

421 Code Civ. Proc. § 341, as amended L. 1899, c. 320. To give a county court jurisdiction of an action against a domestic corporation, it must appear that the location of the corporation's principal place of business, whether by force of a special statute or its articles of association or its actual location, is within the county.—Heenan v. New York, W. S. & B. Ry. Co., 34 Hun, 602.

no jurisdiction of an action against a foreign corporation, nor can it obtain jurisdiction by the corporation appearing and answering to the merits.[422]

§ 195. Powers of county court—Same as those of supreme court.

Where a county court has jurisdiction of an action or a special proceeding, it possesses the same jurisdiction and authority which the supreme court possesses in a like case, and it may render any judgment, or grant either party any relief, which the supreme court might render or grant in a like case, and may enforce its mandates in like manner as the supreme court. And the county judge possesses the same power and authority, in the action or special proceeding, which a justice of the supreme court possesses, in a like action or special proceeding, brought in the supreme court.[423] This Code provision authorizes the county court, in an action to foreclose a mortgage, to reform the condition of the bond,[424] or to dispose of the issues raised by a counterclaim, though it would have no original jurisdiction to entertain an action brought directly on the claims involved therein,[425] or to substitute a party as trustee of the surplus arising from a foreclosure,[426] or, in an action of partition, to determine that a deed is fraudulent and void.[427]

A county court has power, in an action or special proceeding of which it has jurisdiction, to send its process and other mandates into any county of the state, for service or execution, and to enforce obedience thereto, with like power and authority as the supreme court.[428]

—— **Control of judgment or order.** The county court may review its proceedings in an action after judgment, and may

422 Parkhurst v. Rochester Lasting Mach. Co., 48 State Rep. 148.

423 Code Civ. Proc. § 348.

424 Mead v. Langford, 56 Hun, 279, 18 Civ. Proc. R. (Browne) 293, 30 State Rep. 450, which distinguishes Avery v. Willis, 24 Hun, 548, and Thomas v. Harmon, 46 Hun, 75 as cases where the reformation asked for was not incidental to the action of foreclosure.

425 Hall v. Hall, 30 How. Pr. 51; Howard Iron Works v. Buffalo E. Co., 176 N. Y. 1.

426 People's Trust Co. v. Harman, 43 App. Div. 348.

427 Bell v. Gittere, 30 State Rep. 219.

428 Code Civ. Proc. § 347.

grant a new trial,[429] or may order one of its judgments to be docketed in another county nunc pro tunc so as to support an execution issued to such county,[430] or may grant an order out of court, on notice, staying the proceedings of a party under a judgment of the county court until the determination of a motion for a new trial;[431] but it seems that it has no power to entertain a motion to set aside its order after it has been affirmed by the appellate division.[432]

—— **Powers over docketed judgment of justice of the peace.** The county court has power, after a justice's judgment has been docketed as of the county court, to hear a motion to cancel it as to a defendant not served,[433] or to set aside an execution issued on the transcript of a justice's judgment.[434]

—— **Power to order hearing of exceptions in first instance in supreme court.** The county court has no power, where plaintiff is non-suited, to order the exceptions taken to be heard in the first instance at the general term of the supreme court, since it has no power to divest itself of the jurisdiction given it by statute, and to delegate its power to give judgment to another court.[435]

§ 196. Remission of fines and forfeitures.

Upon the application of a person, who has been fined by a court, or of a person whose recognizance has become forfeited, or of his surety, the county court of the county in which the term of the court was held, where the fine was imposed, or the recognizance taken, may, upon good cause shown, and upon such terms as it deems just, make an order remitting the fine, wholly or partly, or the forfeiture of the recognizance, or part of the penalty thereof; or it may discharge the recognizance.[436] An application for such an order cannot be heard

[429] Hall v. Hall, 30 How. Pr. 51.
[430] Roth v. Schloss, 6 Barb. 308.
[431] Ward v. Bundy, 43 How. Pr. 330.
[432] Matter of Folts St., 29 App. Div. 69.
[433] Daniels v. Southard, 23 Misc. 235.
[434] Rowe v. Peckham, 30 App. Div. 173.
[435] Johnson v. New York, O. & W. R. Co., 30 Hun, 166.
[436] Code Civ. Proc. § 350.

until such notice thereof as the court deems reasonable, has been given to the district-attorney of the county, and until he has had an opportunity to examine the matter and prepare to resist the application. And upon granting such an order, the court must always impose, as a condition thereof, the payment of the costs and expenses, if any, incurred in an action or special proceeding for the collection of the fine, or the penalty of the recognizance.[437] But a county court cannot remit any part of a fine exceeding two hundred and fifty dollars imposed by the supreme court, upon conviction for a criminal offense; or a fine to any amount imposed by a court upon an officer or other person for an actual contempt of court, or for disobedience to its process, or other mandate; or remit or discharge a recognizance taken in its county for the appearance of a person in another county. In the latter case, the power of remitting or discharging the recognizance is vested in the county court of the county in which the person is bound to appear.[438] Where a person has been fined by a court of special sessions, or by a justice of the peace, upon a conviction for an offense, and has been committed to jail for non-payment of the fine, the county court of the county may make an order, remitting the fine, wholly or partly, and discharging him from his imprisonment.[439]

§ 197. Powers of county judge conferred by statute.

(a) A county judge within his county, possesses, and on proper application must exercise, the power conferred by law in general language upon an officer authorized to perform the duties of a justice of the supreme court at chambers, or out of court.[440] Thus, in an action pending in the supreme court he has power to grant an ex parte order extending the time to answer,[441] or to stay proceedings on a judgment entered on a report of a referee,[442] or to grant an order to show cause re

[437] Code Civ. Proc. § 352.
[438] Code Civ. Proc. § 351.
[439] Code Civ. Proc. § 353.
[440] Code Civ. Proc. § 241.
[441] Peebles v. Rogers, 5 How. Pr. 208, 3 Code R. 213.
Contra,—Chubbuck v. Morrison, 6 How. Pr. 367.
[442] Otis v. Spencer, 8 How. Pr. 171.

turnable at a special term of the supreme court;[443] but he has no power to hear a motion, as such, pending in the supreme court,[444] or to vacate an order previously made by him in the supreme court,[445] or to make an order in the supreme court on a contested motion or order to show cause,[446] or to make an order to show cause returnable before himself,[447] or to punish a refusal to obey a summons issued by the supreme court to appear and testify before him.[448]

(b) A county judge of the county where a superior city court is situated, may make an order in an action or special proceeding brought in such city court, without notice, or an order to stay proceedings on notice, where a judge of the superior city court might make the same out of court, and with like effect.[449]

(c) A county judge of the county where an action is triable, or in which the attorney for the applicant resides, may make an order out of court and without notice, except to stay proceedings after verdict, report or decision, though the limitation of the power of the county judge does not apply where the statute provides that a particular order may be made by a county judge, or by any county judge.[450]

(d) An application by an insolvent for a discharge from his debts must be made by a petition to the county court of the county in which he resides, or, if he resides in the city of New York, to the supreme court.[451]

443 Vandeburgh v. Gaylord, 7 Wkly. Dig. 136; Larkin v. Steele, 25 Hun, 254.

444 Merritt v. Slocum, 3 How. Pr. 309, 1 Code R. 68.

445 Rogers v. McElhone, 12 Abb. Pr. 292, 20 How. Pr. 441. Compare Peck v. Yorks, 41 Barb. 547.

446 Parmenter v. Roth, 9 Abb. Pr., N. S., 385; Town of Rochester v. Davis, 12 Abb. Pr., N. S., 270.

447 Town of Middletown v. Rondout & O. R. Co., 12 Abb. Pr., N. S., 276, 43 How. Pr. 144.

448 People ex rel. Brunett v. Dutcher, 3 Abb. Pr., N. S., 151.

449 Code Civ. Proc. § 277. This provision seems to be of no effect since the abolition of superior city courts.

450 Code Civ. Proc. §§ 772, 773.

451 Code Civ. Proc. § 2150.

(e) An order for the arrest of a defendant may be obtained from a county judge,[452]

(f) An order for substituted service of a summons issued by any court of record, or an order for publication of summons, may be made by a county judge of the county where the action is triable.[453]

(g) A guardian ad litem for an infant who is a party to an action in the supreme court, may be appointed by the county judge of the county where the action is triable.[454]

(h) Except where it is otherwise specially prescribed by law, an injunction order may be granted by any county judge.[455]

(i) A warrant of attachment may be granted by any county judge.[456]

(j) A county judge has authority to make an order for a discharge of a witness from arrest in a civil action or special proceeding while going to, remaining at, and returning from, the place where he is required to attend as a witness.[457]

(k) An order allowing the taking a deposition to be used within the state in an action pending in the supreme court, may be made by a county judge, as may an order where an action is not pending, but is expected to be brought.[458] A county judge, under his power to do certain acts in actions or proceedings pending in the supreme court, has also power to order an examination before trial.[459]

(l) An order subpoenaing a witness within the state to appear to be examined to obtain testimony for use without the state, may be made by a county judge.[460]

[452] Code Civ. Proc. § 556; People ex rel. Ireland v. Donohue, 15 Hun, 446.

[453] Code Civ. Proc. §§ 435, 440.

[454] Code Civ. Proc. § 472.

[455] Code Civ. Proc. § 606; Hathaway v. Warren, 44 How. Pr. 161; Babcock v. Clark, 23 Hun, 391; People ex rel. Negus v. Dyer, 63 How. Pr. 115, 27 Hun, 548; Morris v. City of New York, 17 Civ. Proc. R. (Browne) 407.

[456] Code Civ. Proc. § 638.

[457] Code Civ. Proc. § 862.

[458] Code Civ. Proc. § 872.

[459] Corbett v. Gibson, 16 Hun, 241.

[460] Code Civ. Proc. §§ 915, 917.

(m) Taxation of lawful fees and necessary expenses of sheriff for taking and keeping replevied chattels, may be made by county judge of the county where the chattel was replevied.[461]

(n) A writ of habeas corpus to bring up a person to testify, may be issued by a county judge.[462]

(o) Order for removal of person from real property, in summary proceedings, may be made by a county judge.[463]

(p) Supplementary proceedings may be instituted before a county judge.[464]

(q) The county judge possesses the same power and authority, in a special proceeding, which can be lawfully instituted before him, out of court, which a justice of the supreme court possesses in a like special proceeding, instituted before him in like manner.[465]

§ 198. Judge of another county or special county judge.

A county judge of any county may hold county courts in any other county when requested by the judge of such other county.[466] In an action or special proceeding in a county court, an order may be made without notice, or an order to stay proceedings may be made upon notice, by a justice of the supreme court, or by the county judge of the county where the attorney for the applicant resides, in a case where the county judge, in whose court the action or special proceeding is brought, may make the same, out of court, and with like effect.[467] A special county judge must act, where not disqualified, if, for any cause, the county judge is incapable of acting in any action or special proceeding.[468] A special county judge has all the powers and may perform all the duties of

461 Code Civ. Proc. § 1702.
462 Code Civ. Proc. §§ 2009, 2010.
463 Code Civ. Proc. § 2234.
464 Code Civ. Proc. § 2434.
465 Code Civ. Proc. § 349.
466 Const. 1894, art. 6, § 14.
467 Code Civ. Proc. § 354.
468 Code Civ. Proc. § 342.

a county judge, and hence may, out of court, issue an order for the examination of a party before trial,[469] or may approve the bond of an assignee for benefit of creditors.[470]

§ 199. Removal of action to supreme court.

The supreme court may, by an order, made at any time after joinder of an issue of fact, and before the trial thereof, remove to itself an action, brought in a county court, under subdivision two or three of section 340 of the Code for the purpose of changing the place of trial thereof. Where an order for removal is made, the place of trial of the action must be changed by the same order to another county; and the subsequent proceedings therein must be the same, as if the action had been orginally brought in the supreme court.[471]

——**When county judge is incapacitated.** If the county judge is, for any cause, incapable to act in an action or special proceeding, pending in the county court, or before him, he must make, and file in the office of the clerk, a certificate of the fact, and if there is no special county judge, or the special county judge is disqualified, the action or special proceeding is removed to the supreme court, if it is then pending in the county court; if it is pending before the county judge, it may be continued before any justice of the supreme court within the same judicial district. The supreme court, upon the application of either party, made upon notice, and upon proof that the county judge is incapable to act in an action or special proceeding pending in the county court, may, and if the special county judge is also incapable to act, must, make an order removing it to the supreme court. Thereupon the subsequent proceedings in the supreme court must be the same as if it had originally been brought in that court, except that an objection to the jurisdiction may be taken, which might have been taken in the county court.[472] The county court, in a special proceeding pending before it, where the county judge is disqualified from acting, cannot make an order

[469] Kinney v. Ellis H. Roberts & Co., 26 Hun, 166.
[470] Thrasher v. Bentley, 59 N. Y. 649.
[471] Code Civ. Proc. § 343.
[472] Code Civ. Proc. § 342.

directing that the case be continued before a justice of the supreme court, but the method of procedure provided for by the Code by filing a certificate of disqualification in the office of the clerk, which ipso facto removes the proceeding to the supreme court, must be followed.[473] Where the county judge is disqualified because of interest, he may not only order the proceedings to be heard before another county judge, but may also designate the county judge to hear and decide the proceedings.[474] In proceedings to remove an assignee for the benefit of creditors, the county judge was disqualified, but he did not make any certificate thereof so as to remove the proceedings, but merely adjourned the hearing and in the meantime resigned. It was held that a person appointed county judge to fill the vacancy had no power in the premises, since the successor could only succeed to jurisdiction of such cases as were lawfully in the court when the former judge resigned.[475]

—— **Effect of order of removal and appeal.** An order of removal takes effect upon the entry thereof in the office of the county clerk. Where the order directs that the action be tried in another county, the clerk with whom it is entered, must forthwith deliver to the clerk of that county, all papers filed therein, and certified copies of all minutes and entries relating thereto; which must be filed, entered, or recorded, as the case requires, in the office of the last mentioned clerk.[476]

—— **Effect of removal.** The removal of an action or special proceeding, does not invalidate, or in any manner impair, a process, provisional remedy, or other proceeding, or a bond, undertaking, or recognizance in the action or special proceeding so removed; each of which continues to have the same validity and effect, as if the removal had not been made. Where bail has been given, the surrender of the defendant in the supreme court has the same effect, as a surrender in the county court would have had, if the action or special proceeding had remained therein.[477]

473 Matter of Village of Rhinebeck, 19 Hun, 346.
474 Matter of Ryers, 10 Hun, 93.
475 Matter of Reddish, 18 State Rep. 41.
476 Code Civ. Proc. § 344.
477 Code Civ. Proc. § 346.

—— **Stay of proceedings.** An order to stay proceedings, for the purpose of affording an opportunity to make the application for removal, may be made by the county judge, or by a judge authorized to make such an order in the supreme court, and with like effect and under like circumstances.[478]

§ 200. Terms of court.

The county court is always open for the transaction of any business, for which notice is not required to be given to an adverse party, except where it is specially prescribed by law, that the business must be done at a stated term. The county judge must, from time to time, appoint the times and places for holding terms of his court. At least two terms, for the trial of issues of law or of fact, must be appointed to be held in each year. Each term may continue as long as the county judge deems necessary. The county judge may, by a new appointment, change the day appointed for holding a term, or appoint one or more additional terms, or dispense with the holding of a term, without affecting any other term or terms theretofore appointed to be held. Each term must be held at the place designated by statute for that purpose, except that the county judge may, from time to time, adjourn a term to any place within the county, for the hearing and decision of motions and appeals, and trials and other proceedings without a jury, and may appoint as many terms as he thinks proper to be held, either at the court house or elsewhere in the county, for the same purpose.[479]

—— **Publication.** Each appointment must be filed in the county clerk's office, and a copy thereof published, at least once in each week, for three successive weeks before a term is held, changed, or dispensed with, by virtue thereof, in the newspaper in the city of Albany, in which legal notices are required to be published, and also in at least one newspaper,

[478] Code Civ. Proc. § 345.

[479] Code Civ. Proc. § 355; Brown v. Snell, 57 N. Y. 286. That court was convened by order of county court instead of by order of county judge does not invalidate the proceedings thereat. People v. Nugent, 57 App. Div. 542.

published in the county, and as many additional newspapers, published therein, as the county judge prescribes.[480]

§ 201. Jurors.

Jurors for the terms of the county court at which issues of fact are triable by jury, must be drawn and notified in the same manner as for a trial term of the supreme court.[481]

§ 202. Officers of court.

The officers of the county court are the clerk of the court, a stenographer, and an interpreter in certain counties.

§ 203. Appellate jurisdiction.

The county court has jurisdiction to review proceedings before a justice of the peace by certiorari or by appeal. On an appeal from a judgment of a justice of the peace, in a case where the appellant is entitled to and demands a new trial,[481a] the case is heard de novo, but the judge may, on the written consent of the parties, order a reference where there is an issue of fact joined.[482]

§ 204. Appeal from county to supreme court.

The Code provides that an appeal may be taken to the appellate division of the supreme court, from a final judgment rendered by the county court, or from an order affecting a substantial right, where an appeal to a court other than the supreme court is not expressly given by statute.[483] An appeal also lies to the supreme court from a decision of the county court on appeal to that court from a final order of a justice of the peace in summary proceedings to recover realty.[484]

—— **Matters of discretion.** The discretion of the county court in granting or refusing a motion or application, is ordi-

[480] Code Civ. Proc. § 356. Failure to publish order invalidates proceedings. People v. Nugent, 57 App. Div. 542.

[481] Code Civ. Proc. § 357.

[481a] Code Civ. Proc. §§ 3068, 3071.

[482] Hyland v. Loomis, 48 Barb. 126.

[483] Code Civ. Proc. §§ 1340, 1342.

[484] Code Civ. Proc. § 2260; Warner v. Henderson, 25 Hun, 303.

narily not reviewable in the supreme court,[485] though an appeal has been held authorized where the order affects a substantial right.[486] The granting of a new trial,[487] or a refusal to open a judicial sale and order a resale,[488] or an order referring an action, where within the power of the court,[489] or an order refusing to set aside an inquest,[490] or an order amending orders claimed to have been irregularly entered by the same judge, is within the discretion of the county court, within the rule.[491]

—— **Orders affecting substantial rights.** An order of the county court which affects a substantial right is appealable to the supreme court, though the order is made in an action appealed to the county court from a justice of the peace,[492] or though the order is in the discretion of the county court.[493] An order punishing for contempt in supplementary proceedings,[494] or an order dismissing an application on the ground that it was made too late,[495] or an order denying a remission of the amount of forfeiture on a bail bond,[496] or an order denying a motion to open a default,[497] or an order vacating a sale made to an assignee for the benefit of creditors, is an order affecting a substantial right;[498] but an order granting or refusing a new trial was held not an order affecting a substantial right, though under the amendment of section 1340 of the Code

485 Myers v. Riley, 36 Hun, 20; Wright v. Chase, 77 Hun, 90.

486 People v. Young, 92 Hun, 373, 71 State Rep. 846; Cramer v. Lovejoy, 41 Hun, 581.

487 Tucker v. Pfau, 70 Hun, 59, 53 State Rep. 553; Thomas v. Keeler, 52 Hun, 318, 23 State Rep. 436, 16 Civ. Proc. R. (Browne) 408.

488 Wolliung v. Akin, 53 Hun, 631, 17 Civ. Proc. R. (Browne) 318, 25 State Rep. 445; Judson v. O'Connell, 37 State Rep. 581.

489 Stebbins v. Cowles, 30 Hun, 523.

490 Kugelman v. Rhodes, 36 Hun, 269.

491 Sexton v. Bennett, 43 State Rep. 85, 63 Hun, 624, 17 N. Y. Supp. 437.

492 Kincaid v. Richardson, 25 Hun, 237; Warner v. Henderson, Id. 303.

493 People v. Young, 92 Hun, 373, 71 State Rep. 846; Cramer v. Lovejoy, 41 Hun, 581.

494 Newell v. Cutler, 19 Hun, 74.

495 Matter of Glenside Woolen Mills, 92 Hun, 188.

496 People v. Young, 92 Hun, 373, 71 State Rep. 846.

497 King v. Sullivan, 31 App. Div. 549.

498 Matter of Rider, 23 Hun, 91.

by Laws, 1888, chap. 507, providing that on the appeal an order granting or refusing a new trial may be reviewed, an appeal therefrom is allowable.[499]

—— **Judgment entered on report of referee.** A judgment entered on the report of a referee in an action in a county court, is appealable to the supreme court.[500]

—— **Order granting leave to issue execution on justice's judgment.** An order of a county court granting leave to issue execution on a judgment of a justice's court, docketed in the county clerk's office, is not appealable to the supreme court, since not an action brought in or taken by appeal to the county court, within section 1342 of the Code.[501]

—— **Order in special proceedings.** An appeal is allowable from an order made in a special proceeding, where it affects a substantial right.[502]

—— **Appeal from orders in supplementary proceedings.** Before 1860, an appeal could not be taken from an order of a county judge in supplementary proceedings,[503] but now, where the execution is issued out of a county court, an appeal from an order made in the course of the proceeding may be taken in like manner as if the order was made in an action brought in the same court,[504] so that an order vacating an order for an examination in supplementary proceedings[505] or an order punishing the judgment debtor as for contempt, where the order is made by the court rather than a judge,[506] or an order directing the receiver to sell,[507] is appealable.

499 Clark v. Eldred, 54 Hun, 5, 26 State Rep. 61. For collection of authorities, see 1 Abb. Cyc. Dig. 444.

500 Hacker v. Ferrill, 66 Barb. 559; Kilmer v. O'Brien, 13 Hun, 224. See, also, Cook v. Darrow, 22 Hun, 306.

501 Townsend v. Tolhurst, 57 Hun, 40, 32 State Rep. 21; Kincaid v. Richardson, 25 Hun, 237.

502 Code Civ. Proc. § 1357; Matter of Klock, 30 App. Div. 24; Matter of Ryers, 72 N. Y. 1; Ithaca Agricultural Works v. Eggleston, 107 N. Y. 272.

503 Smith v. Hart, 11 How. Pr. 203.

504 Code Civ. Proc. § 2433, subd. 2.

505 Schenck v. Irwin, 60 Hun, 361.

506 Weaver v. Brydges, 85 Hun, 503, 66 State Rep. 742. See Finck v. Mannering, 46 Hun, 323 stating that application to vacate or modify

ART. IX. CITY COURTS.

(A) CITY COURTS IN GENERAL.

§ 205. City courts have existed from early times. The first city court was the court of common pleas for the city and county of New York. Additional city courts have been created from

must first be made, which does not apply, however, where the order is made by the "court" as distinguished from the "judge out of court."

507 Matter of Patterson, 12 App. Div. 123.

time to time by the legislature under the constitutional grant of power to the legislature to create inferior local courts. Many of these statutes have been held unconstitutional on the ground that the jurisdiction conferred was not strictly local. The jurisdiction of all city courts is confined to the territorial limits of the city so that summons cannot be served outside the county or a judgment, order or mandate enforced outside the city, except as specially provided. The constitution of 1894 provides that "the legislature shall not hereafter confer upon any inferior or local court of its creation any equity jurisdiction, or any greater jurisdiction in other respects than is conferred upon county courts by or under this article,"[508] and it has been held thereunder that it was not intended to restrict the territorial limits of such courts, but only their jurisdiction respecting subject-matter and persons.[509] City courts of record have been established in New York City, Schenectady, Long Island City, Yonkers, Hudson, Utica, Oswego and Albany, while city courts not of record have been established in Troy, Rochester, Syracuse, Buffalo, Binghamton, Elmira, New Rochelle, Cohoes, Cortland, Plattsburgh, Tonawanda, Watertown and Fulton; and the courts not of record include police courts and courts of justices of the peace in certain cities, and the municipal courts of the city of New York.[510]

(B) SUPERIOR CITY COURTS.

§ 206. Enumeration, jurisdiction, and abolishment.

The superior city courts, which were the court of common pleas for the city and county of New York, the superior court of the city of New York, the superior court of Buffalo, and the city court of Brooklyn, were abolished by the constitution of 1894, and the jurisdiction, original and appellate, possessed by them transferred to the supreme court. The judges were

[508] Const. 1894, art. 6, § 18.

[509] Irwin v. Metropolitan St. Ry. Co., 38 App. Div. 253.

[510] See topic "Municipal Courts" in Abb. Cyc. Dig. for collection of decisions. For a history of the local and inferior courts in the city of New York prior to the Greater New York charter, see Worthington v. London Guarantee & Accident Co., 164 N. Y. 81.

made judges of the supreme court.[511] The jurisdiction of each of the four courts was attempted to be made the same, in their respective territorial limits, by a law passed in 1873, and such law gave said courts practically unlimited original jurisdiction within their respective localities,[512] but the law was held unconstitutional, in so far as jurisdiction of persons or subjects outside of the respective cities was conferred.[513] The act also provided that the jurisdiction of a superior city court should be presumed, and that want of jurisdiction was waived by a general appearance and failure to plead it, and that where jurisdiction was once acquired, the court, and the judge, possessed the same authority which the supreme court possessed in similar cases. It was also provided that actions might be removed to the supreme court, in certain instances.[514] As has been said, the jurisdiction conferred on the superior city courts by section 263 of the Code of Civil Procedure, and by other statutes applicable only to one of the four courts, was very extensive and was practically the same as the jurisdiction conferred on the supreme court, except in regard to territorial limits. It is not necessary to specifically set forth the jurisdiction possessed by such courts, but a brief statement of the history and jurisdiction of the four courts is deemed proper in this connection.

§ 207. History of New York common pleas.

The late court of common pleas for the city and county of New York, is said to be the oldest judicial tribunal in the state. Under the name of the "Mayor's Court," it existed from early colonial times, and it continued to be known by that name until 1821. At that date, as the mayor of the city, by whom the court was formerly held, had long since ceased to preside in it, the name was changed. The organization and powers of this court were remodelled, with those of the other

511 Const. 1894, art. 6, § 5.

512 Laws 1873, c. 239.

513 Hoag v. Lamont, 60 N. Y. 96; Landers v. Staten Island R. Co., 53 N. Y. 450.

514 Code Civ. Proc. § 266 et seq., as existing before constitution of 1894.

courts, under the Constitution of 1846. It had the same jurisdiction in civil actions as the New York superior court, and, in addition, had power to entertain certain special proceedings, and to hear and determine appeals from the inferior local courts of the city—the marine court and district courts. Formerly, its decisions on these appeals were final, but later it was authorized to permit an appeal to be taken from its determination to the court of appeals. From 1846 to 1870, the common pleas was composed of three judges. In 1870 three more judges were added. Its business was transacted at special and general terms, organized on the same general plan with those of the supreme court and of the New York superior court. As it had full powers, both legal and equitable, in actions properly brought before it, and its decisions at general term were only reviewable upon appeal to the court of appeals, it was considered, in respect to actions of which it had jurisdiction, as a court of co-ordinate authority with the supreme court. Its decisions were reported by E. D. Smith, Judge Hilton, and First Justice Daly.[515] The common pleas had jurisdiction of all actions against the city of New York, whether the cause of action was legal or equitable,[516] and except as its jurisdiction was limited by residence or place of service, it had general powers, both common law and equity.[517] The court had as ample jurisdiction of ordinary equity proceedings as the supreme court,[518] and possessed substantially all the powers of county courts,[519] though a judge of the court had not all the powers conferred on the county judge.[520]

[515] A complete history of the court of common pleas for the city and county of New York with an account of the judicial organization of the state, from the time of its settlement by the Dutch in 1623, until the Constitution of 1846, as prepared by the Honorable Charles P. Daly, one of the judges of the court, will be found in the introduction to 1 E. D. Smith.

[516] New York & H. R. Co. v. City of New York, 1 Hilt. 562. Summary proceedings were held to be not within the rule. Brown v. City of New York, 5 Daly, 481.

[517] Carey v. Carey, 2 Daly, 424.

[518] People v. New York Common Pleas, 18 Abb. Pr. 438, 43 Barb. 278, 28 How. Pr. 477.

[519] Wood v. Kelly, 2 Hilt. 334.

[520] People ex rel. Roosevelt v. Edson, 1 How. Pr., N. S., 482, 52 Super. Ct. (20 J. & S.) 53.

§ 208. History of New York superior court.

The superior court of the city of New York was created by statute, in 1828, for the purpose of relieving the excessive and increasing pressure of business pending before the circuit judge of the first circuit. As originally established, and as its organization existed during the period covered by Hall's reports, it consisted of three justices, and its decisions were reviewable on writ of error by the supreme court. But upon the remodelling of the judiciary under the Constitution of 1846, important changes were made in the jurisdiction and organization of this court. The number of justices was changed to six, elected by the electors of the city of New York. Its jurisdiction arose chiefly where the defendant resided or was served with process, or was a corporation doing business, within the city of New York, or, in certain local actions, where the subject-matter of the action was situated, or the cause of action arose, within that city. But, although the jurisdiction of the court was thus limited in respect to the suits of which it could take cognizance, it had in suits properly brought before it, full powers, both legal and equitable, substantially co-ordinate with those possessed by the supreme court. Its business was transacted in the same general way with that of the supreme court. Special terms were held by single justices, for the trial of issues of fact with or without a jury, and for the determination of motions, etc.; and general terms were held, usually by three of the justices, for hearing appeals from decisions at special term. The determinations made in this court were appealable directly from the general term to the court of appeals. The decisions of the superior court, as reported successively by Justices Sandford, Duer, and Bosworth, are considered of equivalent authority with those of the supreme court. The series was continued by Justice Robertson and by Mr. Sweeny, and by Messrs. Spencer and Jones, formerly judges of the court.[521]

§ 209. History of city court of Brooklyn.

The city court of Brooklyn was organized in 1849 with one

[521] McIvor v. McCabe, 16 Abb. Pr. 319, 26 How. Pr. 257. Collection of cases as to jurisdiction, see 8 Abb. Cyc. Dig. 613, 614; Code Civ. Proc. § 263.

judge, but in 1870 its jurisdiction was enlarged and the number of judges increased to three. The court was a court of record, but an inferior court of limited jurisdiction. The Act of 1873 increased its jurisdiction by giving it the jurisdiction of superior city courts.

§ 210. History of superior court of city of Buffalo.

The superior court of the city of Buffalo was originally organized as the recorder's court by Laws 1839, chap. 210. The name was changed by Laws 1854, chap. 96. The court had jurisdiction of actions arising within the city and certain concurrent jurisdiction with the county court of Erie county, and jurisdiction to review by appeal or certiorari judgments of justices of the peace of the city of Buffalo.

(C) CITY COURT OF NEW YORK.

§ 211. Marine court and change of name.

The marine court of the city of New York was given the name of the "city court of New York," in 1883.[523]

§ 212. Inferior court of limited jurisdiction.

The court was not one of the superior city courts, which were abolished by the Constitution of 1894, but is an inferior court of record, of limited jurisdiction but invested with all the authority necessary to give proper effect to the powers expressly conferred.[524]

§ 213. Jurisdiction as conferred by Code.

The jurisdiction of the city court is specifically set forth in the Code as follows:[525]

—— (a) **Action for sum of money or recovery of chattels.** An action against a natural person, or against a foreign or

[523] L. 1883, c. 26, § 1.

[524] Marine court as court of record, see Bennet v. Moody, 2 Super. Ct. (2 Hall) 471; Lester v. Redmond, 6 Hill, 590; Huff v. Knapp, 5 N. Y. (1 Seld.) 65; Talcott v. Rosenberg, 8 Abb. Pr., N. S., 287, 3 Daly, 203.

[525] Code Civ. Proc. § 315 et seq.

domestic corporation, wherein the complaint demands judgment for a sum of money only, or to recover one or more chattels, with or without damages for the taking or the detention thereof, but in an action to recover one or more chattels, a judgment cannot be rendered in favor of the plaintiff for a chattel or chattels the aggregate value of which exceeds two thousand dollars.[526] All causes of action are within the jurisdiction of the city court of New York, where the relief demanded is pecuniary only, where the damages do not exceed $2,000, and where the action is one not requiring equitable relief for the complete disposition of the controversy, and within these limits the jurisdiction is as broad as that of the supreme court.[527] The city court of New York has jurisdiction of actions by residents, or domestic corporations, against foreign corporations, for every cause of action over which it has jurisdiction against residents, or domestic corporations.[528] The court has jurisdiction of an action against an unincorporated association.[529]

—— (b) **Action to foreclose lien on real estate.** The court has jurisdiction of an action to foreclose or enforce a lien upon real property in the city of New York, created as prescribed by statute, in favor of a person who has performed labor upon or furnished materials to be used in the construction, alteration or repair of a building, vault, wharf, fence or other structure; or who has graded, filled in, or otherwise improved, a lot of land, or the sidewalk or street in front of or adjoining a lot of land. In mechanic's lien cases, the court has the same power that the other courts of record possess,[530] and may issue a writ of assistance to put a purchaser at a sale in possession.[531]

—— (c) **Action to enforce lien on chattels.** The court has jurisdiction of an action to foreclose or enforce a lien, for a sum not exceeding two thousand dollars, exclusive of interest, on one or more chattels.

526 Code Civ. Proc. § 316.
527 Crane v. Crane, 46 State Rep. 569.
528 Hand v. Society for Savings, 44 State Rep. 785.
529 Winter v. Hamm, 5 Civ. Proc. R. (Browne) 194.
530 Murray v. Gerety, 25 Abb. N. C. 161, 32 State Rep. 240.
531 Connor v. Schaeffel, 25 Abb. N. C. 344, 19 Civ. Proc. R. (Browne) 378, 38 State Rep. 143.

—— (d) **Judgment by confession.** The taking and entry of a judgment, upon the confession of one or more defendants, where the sum, for which judgment is confessed, does not exceed two thousand dollars, exclusive of interest from the time of making the statement upon which the judgment is entered, is within the court's jurisdiction.

—— **Marine causes of action.** The city court possesses the same jurisdiction as the supreme court of the state in an action in favor of a person, belonging to a vessel in the merchant service, against the owner, master, or commander thereof, for the reasonable value of services, or for the breach of a contract to pay for services rendered or to be rendered on board of the vessel, during a voyage, wholly or partly performed, or intended to be performed by it; and also in an action in favor of or against a person, belonging to or on board of a vessel in the merchant service, to recover damages for an assault, battery, or false imprisonment committed on board the vessel, upon the high seas, or in a place without the United States.[532] The actions known as marine cases are common law cases, as the Code provision specifically provides that the court has no admiralty jurisdiction.

—— **Limitations on amount involved.** The jurisdiction except in marine causes, is subject to the limitation that in an action wherein the complaint demands judgment for a sum of money only, the sum for which judgment is rendered in favor of plaintiff cannot exceed two thousand dollars, exclusive of interest and costs as taxed, except where it is brought upon a bond or undertaking, given in an action or special proceeding in the same court or before a justice thereof, or to recover damages for a breach of promise of marriage. Where the action is brought upon a bond or other contract, the judgment must be for the sum actually due, without regard to a penalty

[532] Code Civ. Proc. § 317, as amended L. 1895, c. 946; Johnson v. Dalton, 1 Cow. 543. It seems, that the marine court, in the absence of treaty stipulation to the contrary, in common with the other courts of record in the state, has jurisdiction in a suit brought by a seaman for wages against the owner of a foreign vessel, both parties being foreigners, and that a writ of attachment may properly be issued against the vessel. Petersen v. Brockelmann, 1 City Ct. R. 193.

therein contained.[533] But a claim for more than $2,000 does not oust the court of its jurisdiction and a judgment rendered in excess is "void" only as to the excess, though "voidable" as a whole,[534] and actions may be consolidated and a judgment rendered in excess of $2,000, provided the amount sued for in each case does not exceed $2,000.[535]

——**Territorial limit of jurisdiction.** The jurisdiction is limited to the county of New York so that a summons cannot ordinarily be served outside the city nor can an attachment against property be issued to any other county than that of New York.[536] An exception in regard to service of summons was evidently intended by the legislature in the case of actions against foreign insurance corporations, for the city court is given jurisdiction of such actions, and the legislature has provided that process against such corporations may be served upon the superintendent of insurance.[537]

§ 214. Jurisdiction in general.

The city court has no jurisdiction to review by certiorari the action of the board of excise in refusing a license,[538] or of an action in the nature of waste under the statute,[539] or of an action on an undertaking given in an action pending in another court,[540] or to issue a writ of mandamus,[541] or to order a referee to take an examination in an adjoining county,[542] or to naturalize an alien.[543] The court has jurisdiction of actions against executors and administrators, since Laws 1889, c. 441, or against sureties on their bonds.[544] The court has

533 Code Civ. Proc. § 316.
534 Roof v. Meyer, 8 Civ. Proc. R. (Browne) 64.
535 Bush v. Abrahams, 18 State Rep. 919.
536 Neely v. McGrandle, 4 Civ. Proc. R. (Browne) 327.
537 People ex rel. Firemen's Ins. Co. of Baltimore v. Justices of City Court, 19 Civ. Proc. R. (Browne) 418.
538 Matter of Semken, 13 Misc. 488, 70 State Rep. 168.
539 Purton v. Watson, 19 State Rep. 6.
540 Bowery Sav. Bank v. Stadmuller, 1 City Ct. R. 104.
541 People ex rel. McMahon v. Board of Excise, 3 State Rep. 253.
542 Webber v. Truax, 1 City Ct. R. 242.
543 Code Civ. Proc. § 318.
544 Matter of Knoop, 33 State Rep. 984; West v. Crosby, 2 City Ct.

power to direct a reference to ascertain the amount of an attorney's lien in a summary proceeding against him to compel the payment of money.[545]

§ 215. Equitable jurisdiction.

The city court has no jurisdiction over equitable causes of action[546] such as an action to reform a written instrument,[547] or an action against trustees or relating to a trust[548] or an action involving an accounting,[549] but it may entertain an equitable defense the same as the supreme court[550] but not a counterclaim for purely equitable relief.[551]

§ 216. Justices of the court.

The court consists of six justices, one of whom is the chief-justice of the court.[552] One of the justices must attend at the chambers of the court, from ten o'clock in the morning until four o'clock in the afternoon of each day, except Sunday, a public holiday, or a day upon which the inhabitants of the

R. 305. Prior to 1889, it was held that while the city court of New York has no jurisdiction of an action commenced against an administrator in the first instance, it has power, by an order of interpleader, on motion of the defendant, to bring in an administrator who claims the same fund as the plaintiff.—Wheeler v. Bowery Sav. Bank, 20 Abb. N. C. 243.

545 Gillespie v. Mulholland, 12 Misc. 40, 66 State Rep. 532.

546 Richards v. Littell, 16 Misc. 339; Dunn v. Wehle, 12 Misc. 653, 67 State Rep. 299.

547 Lynch v. Dowling 1 City Ct. R. 163. But proof of other instruments executed by the mortgagor to correct an error, does not convert an action to replevy chattels taken under the mortgage in which they were inadvertently included, into an equity cause for the reformation of an instrument, so as to oust the city court of jurisdiction.—Bernheimer v. Prince, 29 Misc. 308.

548 Jaecker v. Muller, 20 Misc. 227, 79 State Rep. 415; Nesbit v. Mathews, 41 State Rep. 89; Hunt v. Genet, 6 State Rep. 275, 14 Daly, 225.

549 Gorse v. Lynch, 36 Misc. 150; Frost v. Weehawken Wharf Co., 33 Misc. 736.

550 Mack v. Kitsell, 20 Abb. N. C. 293; Groff v. Bliss, 19 Misc. 14, 76 State Rep. 843; Richards v. Littell, 16 Misc. 339. Contra,—Baxter v. Van Dolsen, N. Y. Daily Reg. Jan. 2, 1883.

551 Groff v. Bliss, 19 Misc. 14, 76 State Rep. 843.

552 Code Civ. Proc. § 320.

city of New York generally refrain from business.[553] Each justice, while in the rooms of the court, and not actually engaged in the performance of other official duties, must act upon any application for his official action, properly made to him. The justice assigned to a trial term or a special term, must remain in attendance, until the day calendar is disposed of, or for such other time as is reasonable.[554]

—— **Chief justice.** The justices of the court, or a majority of them, must, from time to time, as a vacancy occurs in the office of chief justice, designate one of their number to be chief justice. The chief justice has the like authority, within the jurisdiction of the court, as a presiding justice of the supreme court; and when he is present and is not disqualified, he must preside at a general term.[555]

—— **Number necessary for decision at general term.** The concurrence of two justices is necessary to pronounce a decision at a general term. If two or more do not concur, a re-argument must be ordered.

—— **Powers of justices.** Each of the justices may, within the city of New York, administer an oath, or take a deposition, or the acknowledgment or proof of the execution of a written instrument, and certify the same, in like manner and with like authority and effect, as a justice of the supreme court.[556] In an action brought in the court, an order cannot be made, or a warrant of attachment granted, by an officer, other than a justice of the court and each Code provision which empowers an officer other than a judge of the court in which an action is brought, to make an order therein, must be construed as being exclusive of an action brought in the city court.[557]

§ 217. Rules of court.

The justices of the court, or a majority of them, from time to time, establish rules of practice for the court, not inconsistent with the statutes or with the general rules of practice,

553 Code Civ. Proc. § 320.
554 Code Civ. Proc. § 320.
555 Code Civ. Proc. § 322.
556 Code Civ. Proc. § 326.
557 Code Civ. Proc. § 327.

which govern the practice in the court as far as they are applicable thereto.[558]

§ 218. Terms of court.

The justices of the court, or a majority of them, from time to time must appoint, and may alter, the times of holding general, special, and trial terms of the court.[559] They must prescribe the duration of the terms, designate the trial terms at which jurors are required to attend, and assign the justice or justices to preside and attend, at each of the terms so appointed.[560] In case of the inability of a justice to preside or attend, another justice may preside or attend in his place.[561] Each trial and special term must be held by one justice, and each general term by at least two justices.[562] Two or more general, special, or trial terms may be appointed to be held at the same time.[563] The court is always open for the transaction of any business, for which notice is not required to be given to an adverse party.[564] Each term so appointed must be held at the city-hall in the city of New York, except that auxilliary or additional parts, for the transaction of any business specified in the appointment, may be held elsewhere within the city of New York, as designated in the appointment.[565]

§ 219. Reargument.

The justices holding a general term may order a re-argument, before themselves, or at a subsequent general term, of a cause heard by them, or at a previous general term.[566]

§ 220. Officers of court.

The officers of the court are a clerk, stenographers, and an interpreter.

558 Code Civ. Proc. § 323.
559 Code Civ. Proc. § 324.
560 Code Civ. Proc. § 324.
561 Code Civ. Proc. § 324.
562 Code Civ. Proc. § 324.
563 Code Civ. Proc. § 324.
564 Code Civ. Proc. § 324.
565 Code Civ. Proc. § 325.
566 Code Civ. Proc. § 324.

§ 221. Removal of cause to supreme court.

The supreme court, at a term held in the first judicial district, may, by an order made at any time after joinder of an issue of fact, and before the trial thereof, remove to itself an action brought in the city court, for the purpose of changing the place of trial thereof. Where an order for removal is made, the place of trial must be changed by the same order to another county, and the subsequent proceedings therein must be the same as if the action had been originally brought in the supreme court. The provisions applicable to removal of causes from the county to the supreme court, apply to an application to remove such an action, and to the proceedings upon and subsequent to the removal.[567] The granting or refusing the motion is in the discretion of the supreme court,[568] and a demand need not be made for a change of place of trial prior to the notice of application to the supreme court.[569]

§ 222. Removal of causes to city court.

Certain actions brought in the municipal court of New York city are removable to the city court,[570] but on such removal the city court can not grant leave to increase the demand for judgment to $2,000.[571]

§ 223. Mandates—To whom directed and where served.

A mandate of the court other than an order of arrest, a warrant of attachment, an execution, or a requisition to replevy a chattel, all of which must be directed to and executed by the sheriff, may be directed to and executed by the sheriff or a marshal of the city.[572] A mandate can be executed only in the city of New York except (1) that an execution for more than $25 may be issued to the sheriff of any county where the judgment has been docketed; and (2) that a subpoena or

567 Code Civ. Proc. § 319.
568 Matter of J. F. Pease Furnace Co., 37 State Rep. 634.
569 Granger v. Sheble, 34 Hun, 241.
570 Code Civ. Proc. § 3216; Leverson v. Zimmerman, 31 Misc. 642.
571 De Betancourt v. Metropolitan St. Ry. Co., 60 N. Y. Supp. 987.
572 Code Civ. Proc. § 339.

order to apprehend a person for failure to obey a subpoena, may be served or executed within either of the counties of Richmond, Kings, Queens, or Westchester; and (3) that a mandatory order or order to show cause against punishment for contempt may be served and obedience required in any part of the state; and (4) that a warrant to apprehend for contempt of the court may be executed by the sheriff or marshal of New York city in any part of the state.[573]

§ 224. Sections of Code not applicable to city court.

The sections of the Code applicable to service of summons by publication, affidavit for attachment, injunction when right depends on nature of action and security to obtain injunction order, special references in certain cases, and direction of reference to take an account and report, do not apply to the city court.[574]

§ 225. Code provisions applicable exclusively to city court.

The time for personal service of certain notices, in an action brought in the court, is specially provided for as are notices of trial and notes of issue.[575] Special provisions are made in regard to the summons, the time to answer, the time to serve pleadings and for taking certain proceedings in the action, the necessary contents of an affidavit of attachment, depositions, reference, filing and contents of decision, counterclaims, sale of perishable property, and remission of portion of recovery.[576] In marine causes, the Code sets forth rules exclusively applicable thereto in regard to order of arrest and bail and proceedings thereon.[577]

§ 226. Appeals.

Appeals are allowed to the general term of the city court and from the general term to the supreme court.[578]

573 Code Civ. Proc. § 338.
574 Code Civ. Proc. § 3160.
575 Code Civ. Proc. §§ 3161, 3162.
576 Code Civ. Proc. §§ 3165-3176.
577 Code Civ. Proc. §§ 3177-3187.
578 Code Civ. Proc. §§ 3188-3194. Collection of cases as to right to appeal from city court, see 1 Abb. Cyc. Dig. 446-452.

ART. X. MISCELLANEOUS COURTS.

§ 227. Justices' courts.

Justices' courts are town and city courts. They are inferior courts and not courts of record, and their procedure is governed by chapter nineteen of the Code.[579] Their jurisdiction is only such as is specially conferred by statute.[580] Questions relating to such courts will not be considered in this book.

§ 228. Surrogate courts.

It is beyond the scope of this work to consider the nature and powers of the surrogate courts, or the practice relative thereto, but it may be stated that the Constitution of 1894 continued the existing surrogate courts, with the same jurisdiction. The county judge is the surrogate of his county, except where a separate surrogate is elected, and in counties having a population exceeding forty thousand, wherein there is no separate surrogate, the legislature can provide for the election of a separate officer to be surrogate. For the relief of surrogates' courts, the legislature may confer upon the supreme court in any county having a population exceeding four hundred thousand, the powers and jurisdiction of surrogates, with authority to try issues of fact by jury in probate cases.[581] The general jurisdiction is as follows: 1. To take the proof of wills; to admit wills to probate; to revoke the probate thereof; and to take and revoke probate of heirship 2. To grant and revoke letters testamentary and letters of administration, and to appoint a successor in place of a person whose letters have been revoked. 3. To direct and control the conduct, and settle the accounts, of executors, administrators and testamentary trustees; to remove testamentary trustees and to appoint a successor in place of a testamentary trustee

579 Const. 1894, art. 6, § 17.
580 Code Civ. Proc. § 2861.
581 Const. 1894, art. 6, § 15.

so removed. 4. To enforce the payment of debts and legacies; the distribution of the estates of decedents; and the payment or delivery, by executors, administrators, and testamentary trustees, of money or other property in their possession, belonging to the estate. 5. To direct the disposition of real property, and interests in real property, of decedents, for the payment of their debts and funeral expenses, and the disposition of the proceeds thereof. 6. To administer justice, in all matters relating to the affairs of decedents, according to the provisions of the statutes relating thereto. 7. To appoint and remove guardians for infants; to compel the payment and delivery by them of money or other property belonging to their wards; and, in the cases specially prescribed by law, to direct and control their conduct, and settle their accounts.[582]

§ 229. Court of claims.

The court of claims was originally called the board of claims. It came into existence as the board of audit and was continued by the constitution of 1894 as the court of claims. It is composed of three judges and has jurisdiction of claims against the state. An appeal lies to the appellate division of the supreme court of the third department. The court holds four sessions a year at Albany and may hold sessions at other places. Power is conferred to establish rules of practice, and pursuant thereto thirty-three rules were adopted April 20, 1898.[583]

§ 230. Court for trial of impeachments.

The court for the trial of impeachments was organized by Laws 1872, c. 627. The court has jurisdiction to try impeachments, when presented by the Assembly, of all civil officers of the state, except justices of the peace, justices of justices' courts, police justices, and their clerks, for willful and corrupt misconduct in office.[584] The court is composed of the presi-

[582] Code Civ. Proc. § 2472.

[583] Code Civ. Proc. §§ 263-280, added by Laws 1897, c. 36 and Laws 1901, c. 286, 440, Laws 1876, c. 444, as amended Laws 1881, c. 211, Laws 1895, c. 948, 807, Laws 1899, c. 336, Laws 1888, c. 435, Laws 1887, c. 36, Laws 1884, c. 329, 336.

[584] Code Cr. Proc. § 12.

dent of the senate, the senators, or a majority of them, and the judges of the court of appeals, or a majority of them, but on the trial of an impeachment against the governor or lieutenant governor, the lieutenant governor cannot act as a member of the court.[585] No judicial officer shall exercise his office, after articles of impeachment against him shall have been preferred to the senate, until he shall have been acquitted. Before the trial of an impeachment the members of the court shall take an oath or affirmation truly and impartially to try the impeachment according to the evidence, and no person shall be convicted without the concurrence of two-thirds of the members present. Judgment in cases of impeachment shall not extend further than to removal from office, or removal from office and disqualification to hold and enjoy any office of honor, trust or profit under this state; but the party impeached shall be liable to indictment and punishment according to law.[586]

ART XI. OFFICERS OF COURTS.

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585 Code Cr. Proc. § 13.
586 Const. 1894, art. 6, § 13

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(A) JUDGES.

(1) Definition, Qualifications, and Age Limit.

§ 231. Definition of a judge.

A judge is a public officer lawfully appointed to decide litigated questions according to law. He is an officer so named in his commission, and who presides in some court. In its most extensive sense, the term includes all officers appointed to decide litigated questions, while acting in that capacity, including justices of the peace, and even jurors, it is said who are judges of the facts. In ordinary legal use, however, the term is limited to the sense of the second of the definitions here given, unless it may be that the case of a justice or commissioner acting judicially is to be considered an extension of this meaning.[587] The Code provides that the word "judge" includes a justice, surrogate, recorder, justice of the peace, or other judicial officer, authorized or required to act, or prohibited from acting in or with respect to the matter or thing, referred to in the provision wherein that word is used.[588] The statutory construction law provides that the term "judge" includes every judicial officer authorized, alone or with others, to hold or preside over a court of record.[589]

[587] Cyc. Law Dict. 507.
[588] Code Civ. Proc. § 3343, subd. 3.
[589] L. 1892, c. 677, § 6.

—— **Judge same as justice.** The terms "judge" and "justice," as used in the Codes, seem to be synonymous.

§ 232. De facto judges.

The acts of a judge, so far as the parties to the action or proceeding are concerned, are valid though he is a mere de facto judge.[590] When a court with competent jurisdiction is duly established, a suitor who resorts to it for the administration of justice and the protection of private rights should not be defeated or embarrassed by questions relating to the title of the judge, who presides in the court, to his office. If the court exists under the constitution and laws and it has jurisdiction of the case, any defect in the election or mode of appointing the judge is not available to litigants. Such questions must be raised by some action or proceeding to which the judge himself is a party and where the issue as to the validity of his election or appointment is directly involved.[591]

§ 233. Qualifications.

No one shall be eligible to the office of judge of the court of appeals, justice of the supreme court, or, except in the county of Hamilton, to the office of county judge or surrogate, who is not an attorney and counselor of this state.[592]

§ 234. Judge must file certificate of age.

A judge of a court of record must, within ten days after he enters on the duties of his office, make and sign a certificate, stating his age, and the time when his official term will expire, either by completion of a full term, or by reason of the disability of age, prescribed in the constitution. The certificate must be filed in the office of the secretary of state.[593] The age limit is placed at seventy years, by the constitutions of 1846

590 People ex rel. Coyle v. Sherwood, 4 Thomp. & C. 34; Pepin v. Lachenmeyer, 45 N. Y. 27.

591 Curtin v. Barton, 139 N. Y. 505.

592 Const. 1894, art. 6, § 20.

593 Code Civ. Proc. § 54.

and of 1894,[594] which apply to county judges,[595] but the fact that a judge sits after he has passed the constitutional limit of age, does not render his judgment void.[596]

(2) Restrictions and Liabilities.

§ 235. Prohibition against holding other offices.

The constitutional provision that the judges of the court of appeals and the justices of the supreme court shall not hold any other office or public trust,[597] is aimed at the individuals, who for the time being fill the offices referred to, and not at the courts they are authorized to hold. The adding one or several additional judicial duties to the office of a justice of the supreme court, whose powers and duties are already so extensive, cannot be said to confer on him any other office or public trust.[598]

§ 236. Fees and compensation from litigants.

A judge or other judicial officer, except a justice of the peace, shall not demand or receive a fee or other compensation, for giving his advice in a matter or thing pending before him, or which he has reason to believe will be brought before him for decision, or for preparing a paper or other proceeding, relating to such a matter or thing.[599]

[594] Const. 1846, art. 6, § 13; Const. 1894, art. 6, § 12.

[595] People ex rel. Davis v. Gardner, 45 N. Y. 812; People ex rel. Joyce v. Brundage, 78 N. Y. 403.

[596] So held in a criminal case in Dohring v. People, 2 Thomp. & C. 458.

[597] Const. 1894, art. 6, § 10.

[598] So held in regard to a statute giving supreme court power in condemnation proceedings (Striker v. Kelly, 7 Hill, 9) and of a statute giving the court power in local improvement proceedings (Beekman's Case, 11 Abb. Pr. 164), and of a statute authorizing the presiding justice of the supreme court and others, to designate the law journal in which certain matters were to be published (Daily Register Printing & Publishing Co. v. City of New York, 52 Hun, 542).

[599] Code Civ. Proc. § 51; Const. 1894, art. 6, § 20; McLaren v. Charrier, 5 Paige, 530.

§ 236a. Power of judge, his partner, or his clerk, to practice law.

No judge of the court of appeals, or justice of the supreme court, or any county judge or surrogate in a county having a population exceeding one hundred and twenty thousand, shall practice as an attorney or counselor in any court of record, or act as referee. The legislature may impose a similar prohibition upon county judges and surrogates in other counties.[600] This provision has been held not applicable to the commissioners of appeals, who have been allowed to act as referees.[601] The clause "or act as referee" can not be limited in its effect so as merely prohibit the named officers from "receiving fees" as referees, and hence a referee, on becoming a justice of the supreme court, is prohibited from acting further as referee, even by consent of the parties.[602] A judge or his law partner shall not practice or act as an attorney, in a court of which the judge is, or is entitled to act as, a member, or in a cause originating in that court, except that the partner may practice where the judge is a member of a court, ex-officio, and does not officiate or take part, as a member of that court, in any of the proceedings therein.[603] This statute however, does not extend to prohibit a judge, who, as creditor of a corporation, is a party in interest to proceedings to sequester its property, from drawing a petition in the cause, or applying for an order thereon.[604] The law partner or clerk of a judge shall not practice before him, as attorney or counsellor in any cause, or be employed in any cause which originated before him.[605] A judge shall not act as attorney or counsellor in any action or special proceeding, which has been before him in his official character.[606]

§ 237. Liability for official acts.

A judge is exempt from liability in respect to a thing done

600 Const. 1894, art. 6, § 20.
601 Settle v. Van Evrea, 49 N. Y. 280.
602 Countryman v. Norton, 21 Hun, 17.
603 Code Civ. Proc. § 49.
604 Libby v. Rosekrans, 55 Barb. 202.
605 Code Civ. Proc. § 50, as amended L. 1877, c. 416.
606 Code Civ. Proc. § 50, as amended L. 1877, c. 416.

in the exercise of his judicial functions, though he was actuated by corrupt motives,[607] or though he acts in excess of his jurisdiction.[608]

§ 238. Interest of ex-officio judge.

An ex-officio judge shall not, directly or indirectly, be interested in the costs, or the compensation of an attorney or counsellor, in the court of which he is ex-officio a judge.[609]

§ 239. Power of judge in another court to review his own decision.

The constitution provides that no judge or justice shall sit in the appellate division or in the court of appeals in review of a decision made by him or by any court of which he was at the time a sitting member,[610] and it has been held thereunder, that an order made by a general term of the supreme court affirming an order made at special term by one of the justices who sits in the general term, is reversible,[611] but where the appeal is from an order vacating an ex parte order made by a justice at special term, who is sitting at the general term, he does not sit in review of his own decision, within the constitutional prohibition, since the order made by him is not presented for review.[612]

§ 240. Successive applications to two or more judges.

The right to apply to another judge, after a motion has been denied by one judge, for the same relief, which is in general prohibited by section 776 of the Code of Civil Procedure, will

[607] Yates v. Lansing, 9 Johns. 395; Weaver v. Devendorf, 3 Denio, 117; Voorhees v. Martin, 12 Barb. 508; People v. Stocking, 50 Barb. 573, 32 How. Pr. 48, 6 Park. Cr. R. 263; Mervin v. Rogers, 18 State Rep. 949; Hommert v. Gleason, 38 State Rep. 342, 20 Civ. Proc. R. (Browne) 349; Stanton v. Schell, 5 Super. Ct. (3 Sandf.) 323.

[608] Lange v. Benedict, 73 N. Y. 12.

[609] Code Civ. Proc. § 49.

[610] Const. 1894, art. 6, § 3.

[611] VanArsdale v. King, 152 N. Y. 69; Duryea v. Traphagen, 84 N. Y. 652.

[612] Philips v. Germania Bank, 107 N. Y. 630.

be treated of in a subsequent chapter relating to motions and orders.[613]

(3) CHANGE OF JUDGE.

§ 241. Effect of change of judges.

An action or special proceeding, in a court of record, is not discontinued by a vacancy or change in the judges of the court or by the re-election or re-appointment of a judge, but it must be continued, heard and determined, by the court, as constituted at the time of the hearing or determination.[614] This section relates to special proceedings before a judge of a court of record and not to district courts.[615] It has been held that where the term of a justice of the supreme court expired during a trial, and he immediately entered upon a new term under a re-election, that he had jurisdiction to conclude the trial and decide the case.[616] And it is no objection to proceedings in foreclosure that the court by which the final judgment of foreclosure and sale was rendered upon the coming in of the referee's report, was not held by the same judge who rendered the preliminary judgment, ascertaining and settling the rights of the parties, and ordering the reference.[617]

—— **Powers of judge out of office.** In general, it may be said that the powers of a judge of a court, with respect to actions or proceedings pending before the court over which he presides, terminate when he ceases to be a judge or when his office expires by resignation, removal, expiration of his term or otherwise. In order to prevent a failure of justice, or great expense and inconvenience to suitors or parties having business before the court, or before judicial officers, this rule has been, in exceptional and specified cases, modified by statute.[618] The Code provides that after a judge is out of office, he may settle the case or exception or make any return of proceedings had before him while he was in office, and may

[613] See post, §§ 635-640.
[614] Code Civ. Proc. § 25.
[615] Rodding v. Kane, 16 State Rep. 677.
[616] Kelly v. Christal, 16 Hun, 242.
[617] Chamberlain v. Dempsey, 36 N. Y. 144.
[618] Matter of City of New York, 139 N. Y. 140.

be compelled so to do by the court in which the action or special proceedings is pending,[619] but this provision does not empower a judge out of office, after his general judicial functions have ceased, to decide an issue or motion.[620] A cause heard and submitted to a judicial officer during his term remains sub judice till decided by him, though his term be ended, and he may sign findings therein after his term has expired.[621] The correction by a justice of the supreme court of an order made by him at special term, by changing the reference therein to another deed in the case than the one referred to in the order, being an obvious clerical error, is proper, although the term of office of the justice had meantime expired by the limitation of age, and he had been assigned to duty again by the governor.[622]

§ 242. Substitution of an officer in special proceedings.

In case of the death, sickness, resignation, removal from office, absence from the county, or other disability of an officer before whom or in whose court a special proceeding has been instituted, where no express provision is made by law for the continuance thereof, it may be continued before the officer's successor, or any other officer residing in the same county, before whom it might have been originally instituted; or, if there is no such officer in the same county or in case such officer be disqualified, then before an officer in an adjoining county, who would originally have had jurisdiction of the subject matter, if it had occurred or existed in the latter county; and in case such special proceeding be pending in a county court and the county judge of the county be disqualified to hear and decide the same, then in such case all further proceedings therein may be had in the county court of any adjoining county, which court shall have jurisdiction to hear, try and determine the same and to enforce its order.[623] Thus an order to show cause why punishment for contempt should not be imposed,

619 Code Civ. Proc. § 25.
620 Matter of City of New York, 139 N. Y. 140.
621 Manneck Mfg. Co. v. Smith & Griggs Mfg. Co., 2 City Ct. R. 37.
622 Deutermann v. Pollock, 30 App. Div. 378.
623 Code Civ. Proc. § 52, as amended L. 1899, c. 378.

may be heard before the successor of the judge who made the order where his term expires before the return day.[624] The section is not mandatory,[625] and does not give the former officer a right to continue a proceeding commenced before him during his term of office after his term of office has expired.[626]

—— **Proceedings before substituted officer.** At the time and place specified in a notice or order, for a party to appear, or for any other proceeding to be taken, or at the time and place specified in the notice to be given, the officer substituted to continue a special proceeding instituted before another, may act, with respect to the special proceeding, as if it had been originally instituted before him. But a proceeding shall not be taken before a substituted officer, at a time or place, other than that specified in the original notice or order, until notice of the substitution, and of the time and place appointed for the proceeding to be taken, has been given, either by personal service or by publication, in such manner and for such time as the substituted officer directs, to each party who may be affected thereby, and who has not appeared before either officer. Where, after a hearing has been commenced, it is adjourned to the next judicial day, each day to which it is so adjourned, is regarded, as the day specified in the original notice or order, or in the notice to appear before the substituted officer, as the case requires.[627]

§ 243. Continuation of proceedings before another judge of same court.

In the city and county of New York, and in the county of Kings, a special proceeding instituted before a judge of a court of record, or a proceeding commenced before a judge of the court, out of court, in an action or special proceeding pending in a court of record, may be continued from time to time, before one or more other judges of the same court, with like effect, as if it had been instituted or commenced before the judge

624 Gamman v. Berry, 34 Hun, 138.
625 Darrow v. Riley, 5 Misc. 363.
626 Rodding v. Kane, 16 State Rep. 677.
627 Code Civ. Proc. § 53.

who last hears the same.[628] The true interpretation of this Code provision is said to be that a proceeding commenced in the "first judicial district" by any judge competent to institute it therein, may be continued in such district before any other judge competent to have commenced it.[629] The precise scope and meaning of this Code provision, according to the court of appeals, is left in some doubt by the decisions, but it states that it is safe to affirm that it relates to a proceeding before the judge, out of court, acting as an officer, and has no application to an issue or motion in an action or special proceeding heard by the court before the office of the judge holding the same was vacated.[630]

(4) Disqualification of Judges.

§ 244. Interest as disqualification.

It is a rule of the common law that, "no man can be a judge in his own cause." The first idea in the administration of justice is that a judge must necessarily be free from all bias and partiality. He cannot be both judge and party, arbiter and advocate in the same cause. The Code provides that a judge shall not sit as such in, or take any part in the decision of, a cause or matter to which he is a party, or in which he has been attorney or counsel, or in which he is interested.[631] The prohibition does not extend to cases where the interest is simply in some question of law involved in the controversy.[632]

—— **Stockholder of corporation.** The question arose, at an early day, as to whether a judge is eligible in an action, wherein a corporation is a party, where he is a stockholder in the corporation. Chief Justice Kent, being a stockholder of a corporation which was a defendant in a suit before him, assumed jurisdiction to prevent a failure of justice, holding, however, that he was not a party to the suit,[633] but Chancellor Sandford

[628] Code Civ. Proc. § 26, as amended L. 1890, c. 451.

[629] Dresser v. Van Pelt, 15 How. Pr. 19. It should be noticed, however, that when this decision was rendered, Kings county was not included in the provisions of the statute. It was added in 1890.

[630] Matter of City of New York, 139 N. Y. 140.

[631] Code Civ. Proc. § 46.

[632] People ex rel. Morris v. Edmonds, 15 Barb. 529.

refused to sit in a case where he was a stockholder of the complainant corporation, on the ground that he was a party within the statute.[634] The rule is now, however, well settled, that a stockholder of a corporation cannot act as judge in a proceeding in which the corporation is a party,[635] and a judge who was a co-executor of an estate holding stock in a company, has been held disqualified to try an action for damages against the company,[636] but a judge who has parted with his interest in the corporation is not disqualified.[637] And a judge of the court of appeals or a justice of the appellate division of the supreme court is not disqualified from taking part in the decision of an action or special proceeding, in which an insurance company is a party interested, by reason of his being a policy holder therein.[638]

—— **Interest in costs.** A judge shall not, directly or indirectly, be interested in the costs of an action or special proceeding, brought before him, or in a court of which he is, or is entitled to act as a member, except an action or a special proceeding to which he is a party, or in which he is interested.[639]

—— **Depriving party of remedy.** It has been held, after an exhaustive review of the authorities, that the following rule is authorized by the common law and by the statute, viz.: "where a judicial officer has not so direct an interest in the cause or matter as that the result must necessarily affect him to his personal or pecuniary loss or gain, or where his personal or pecuniary interest is minute, and he has so exclusive jurisdiction of the cause or matter by the constitution or by statute, as that his refusal to act will prevent any proceeding in it, then he may act so far as that there may not be a failure of remedy, or, as it is sometimes expressed, a failure of justice."[640]

633 Stuart v. Mechanics' & Farmers' Bank, 19 Johns. 496.

634 Washington Ins. Co. v. Price, Hopk. Ch. 1.

635 Matter of Reddish, 18 State Rep. 41.

636 Cregin v. Brooklyn Cross Town R. Co., 56 How. Pr. 32.

637 Palmer v. Lawrence, 5 N. Y. (1 Seld.) 389.

638 Code Civ. Proc. § 46, as amended L. 1883, c. 234, L. 1895, c. 267, L. 1897, c. 268, L. 1903, c. 216.

639 Code Civ. Proc. § 47.

640 Matter of Ryers, 72 N. Y. 1; People ex rel. Pond v. Board of Trustees of Saratoga Springs, 4 App. Div. 399.

§ 245. Relationship to parties.

At common law, consanguinity to either of the parties did not disqualify a judge,[641] but the Code provides that a judge can not sit as such in, or take any part in the decision of, a cause or matter, if he is related by consanguinity, or affinity to any party to the controversy within the sixth degree. The degree is to be ascertained by ascending from the judge to the common ancestor, and descending to the party, counting a degree for each person in both lines, including the judge and party, and excluding the common ancestor.[642] Consanguinity is the relationship of persons descending from the same common ancestor. Affinity is the relationship which exists between a husband and the blood relatives of his wife, or a wife and the blood relation of her husband. The rule applies to the court of appeals.[643]

The kinship, however, in order to disqualify, must exist between the judge and some person who is actually a party to the cause. It is not enough that he is related to some person, not a party, who is or may be interested in it, or affected by his order, so that the fact of a relative of a judge within the prohibited degree, being a stockholder of a corporation, which is a party, does not disqualify the judge, since such stockholder, though interested, is not a party.[644]

—— **Degree of relationship.** Two men who marry sisters,[645] or second cousins, are related, so as disqualify,[646] but where

641 Matter of Dodge & Stevenson Mfg. Co., 77 N. Y. 101, 112.

642 Code Civ. Proc. § 46.

643 Oakley v. Aspinwall, 3 N. Y. (3 Comst.) 547.

644 Matter of Dodge & Stevenson Mfg. Co., 77 N. Y. 101, 107. An overseer of the poor and father-in-law of a justice of the peace is a party to a bastardy proceeding within provision disqualifying for affinity or consanguinity.—Rivenburgh v. Henness, 4 Lans. 208.

A judge is not disqualified from granting a writ of assistance against a defendant in possession by reason of his relationship to another defendant not in possession.—New York Life Ins. & Trust Co. v. Rand, 8 How. Pr. 35.

A guardian ad litem is not a "party" within the meaning of the Code provision.—Matter of VanWagonen's Will, 69 Hun, 365, 52 State Rep. 699.

645 Foot v. Morgan, 1 Hill, 654.

646 Post v. Black, 5 Denio, 66.

the widow of the brother of the judge was dead, and there was no evidence that there was any issue of her second marriage with plaintiff, the judge was not disqualified.[647] A justice of the peace who was a son-in-law of the plaintiff, insisted on retaining jurisdiction of a cause, notwithstanding it was objected against by the defendant, and the supreme court held that this was of itself evidence that the trial was not fair and impartial, and reversed the judgment.[648]

—— **Ministerial act.** A mere ministerial act is not invalidated by the judge's relationship to a party.[649]

—— **Removal of disqualification.** The fact that a suit in which a relative of the judge is the plaintiff in interest, is prosecuted in another's name, does not remove the disqualification,[650] nor does the fact that the party to whom the judge is related, has been indemnified by a third person.[651]

—— **Waiver of disqualification.** The disqualification cannot be waived, even by consent of both parties.[652] The judgment is absolutely void.[653]

§ 246. Interest as citizen or taxpayer.

A judge of a court of record is not disqualified from hearing or deciding an action or special proceeding, matter, or

[647] Carman v. Newell, 1 Denio, 25.

Where the deceased husband of defendant, a widow, was a first cousin of the vice-chancellor, and defendant had a son by that husband, who was still living, there was a relationship by affinity between defendant and the vice-chancellor. The death of the husband would have severed the tie of affinity had not the living issue of the marriage, commingling the blood of poth parties, continued to preserve the affinity.—Paddock v. Wells, 2 Barb. Ch. 331.

[648] Bellows v. Pearson, 19 Johns. 172.

[649] Bell v. Vernooy, 18 Hun, 125, where an order of reference entered by consent, on the case being called for trial, was held not invalid because one of the parties was related to the judge.

[650] Foot v. Morgan, 1 Hill, 654.

[651] Oakley v. Aspinwall, 3 N. Y. (3 Comst.) 547.

[652] Oakley v. Aspinwall, 3 N. Y. (3 Comst.) 547; Matthews v. Noble, 25 Misc. 674.

[653] People v. Connor, 142 N. Y. 130; Matter of Depuy, 29 State Rep. 642.

question, by reason of his being a resident or taxpayer of a town, village, city or county interested therein.[654]

§ 247. Witness in case.

A judge who is a witness in the cause ought not to sit as judge,[655] but it has been held in a criminal case, that the court does not thereby lose jurisdiction.[656]

§ 248. Absence during oral argument.

A judge, other than the judge of the court of appeals, or of the appellate division of the supreme court, shall not decide or take part in the decision of a question, which was argued orally in the court, when he was not present and sitting therein as a judge.[657] This provision, however, does not prevent a judge who was not present, from sitting as a part of the court in order to make up a quorum, while the two judges, who were present, announce the decision.[658]

§ 249. Review of own acts.

Matters determined in the lower court by a judge could not be reviewed by him when he had become a member of an appellate court, under the Revised Statutes, but such provision was abrogated by the constitution of 1846, though reinstated by a constitutional amendment in 1869.[659] Thus a judge who made an order below, cannot take part in determining a motion to dismiss an appeal therefrom, on the ground that it is not appealable,[660] and a justice of the general term cannot participate in reviewing an order denying a motion to vacate a pre-

[654] Code Civ. Proc. § 48, as amended L. 1895, c. 946.

[655] Brown v. Brown, 2 E. D. Smith, 153.

[656] People v. Dohring, 59 N. Y. 374.

[657] Code Civ. Proc. § 46, as amended L. 1883, c. 234, L. 1895, c. 267, and L. 1897, c. 268.

[658] Corning v. Slosson, 16 N. Y. 294; Wittleder v. Citizens' Electric Illuminating Co., 47 App. Div. 543.

[659] Pierce v. Delamater, 1 N. Y. (1 Comst.) 17; Real v. People, 42 N. Y. 270.

[660] Pistor v. Brundrett, 42 How. Pr. 5; Pistor v. Hatfield, 46 N. Y. 249.

vious order which he had made,[661] or in reviewing a judgment where he settled the form of the judgment and granted an allowance in the lower court,[662] but where a decision was made by another judge, the signing of the order merely pro forma, does not disqualify the judge signing it, from hearing the appeal therefrom.[663]

—— **Waiver of disqualification.** The disqualification cannot be waived.[664]

§ 250. Right to preside at second trial.

Where an objection was made that a trial should not be had before a judge, for the reason that he had tried the cause on a former occasion, it was held that the practice of re-trying causes before the same judge who presided at the first trial, has continued from the time of the organization of the supreme court, and that an objection to such proceeding was unheard of.[665]

(5) Power of Judge out of Court.

§ 251. Chamber business.

Business done out of court is usually said to be done at chambers, and business of this kind may be done by a judge at any place, but when acting out of court, he is an officer of limited jurisdiction and can do only what the statute expressly authorizes him to do.[666] A justice of the appellate division may exercise any of the powers which a justice of the supreme court may exercise out of court.[667] An order, which can only be made by the court on notice, cannot be brought on at a

661 VanArsdale v. King, 152 N. Y. 69.

662 Murdock v. International Tile & Trim Co., 14 Misc. 225, 70 State Rep. 486.

663 Mori v. Pearsall, 14 Misc. 251.

664 Murdock v. International Tile & Trim Co., 14 Misc. 225, 70 State Rep. 486.

665 Fry v. Bennett, 28 N. Y. 324.

666 Bangs v. Selden, 13 How. Pr. 374.

667 Const. 1894, art. 6, § 2; Code Civ. Proc. § 220 as amended L. 1895, c. 376.

special term adjourned to the judge's chambers, except by consent of all the parties.[668]

§ 252. Rendition of judgment.

There is but one case in which a judge at chambers can grant a judgment, and that is where a demurrer, answer or reply is frivolous. In all other cases, judgment can be rendered only by the court when sitting as such, and not by a judge at his lodgings, in the street or even in chambers.[669]

§ 253. Motion for a new trial.

A motion for a new trial cannot be made to a judge out of court, even in the first judicial district, in which all other motions may be made before a judge out of court.[670]

§ 254. Stay of proceedings.

Any judge, anywhere, may make an order, out of court, and without notice, staying the proceedings in an action to enable a party to apply for some ulterior relief, provided the time shall not exceed twenty days. But if the stay go beyond that limit, and the order was granted without notice, it is void.[671] The order can not be absolutely indefinite and continuing.[672]

§ 255. Supplementary proceedings.

Proceedings supplementary to execution are in no sense identical with ordinary chamber business.[673] The words "powers of a justice of the supreme court at chambers" comprise merely the ordinary chamber business, and do not embrace supplementary or special proceedings of any description.[674]

668 Matter of Wadley, 29 Hun, 12.

669 Aymar v. Chace, 12 Barb. 301; Witherspoon v. Van Dolar, 15 How. Pr. 266; Witherhead v. Allen, 28 Barb. 661.

670 Boucicault v. Boucicault, 21 Hun, 431.

671 Code Civ. Proc. § 775; Bangs v. Selden, 13 How. Pr. 374.

672 Bank of Genesee v. Spencer, 15 How. Pr. 14.

673 Cushman v. Johnson, 13 How. Pr. 495.

674 Cushman v. Johnson, 13 How. Pr. 495.

Under the statutes, however, many of the motions relating to supplementary proceedings may be made before a judge out of court.[675]

§ 256. Issuance and vacation of attachment.

A warrant of attachment may be granted by a judge out of court, and, where so granted, an application to vacate or modify the warrant may be made to the same judge in or out of court.[676]

§ 257. Punishment for contempt.

There is no authority for a judge out of court to punish as for a contempt of an order made by him out of court, unless specially authorized thereto in the act providing for such proceedings, and there is no authority in the court to punish as for a contempt a disobedience of an order made by a judge out of court in a proceeding not pending in the court. Even in the habeas corpus act, no authority to punish for a contempt is given, but the statute provides for issuing an attachment by which the offending party is to be arrested. In supplementary proceedings, such power is given by the Code to the judge, and this power, it has been held, should be exercised by the judge and not the court,[677] except that the court also has power to punish where the order is made by a judge out of court, but in an action pending in the court.[678]

§ 258. Power over exceptions.

A justice out of court has no power to make an order striking exceptions to the findings and refusals to find of the court in an equity case from the judgment roll and case on appeal as filed.[679]

675 Code Civ. Proc. §§ 2432-2471.

676 Code Civ. Proc. § 638; Code Civ. Proc. § 683; Woodruff v. Imperial Fire Ins. Co., 90 N. Y. 521.

677 People ex rel. Geery v. Brennan, 45 Barb. 344; Shepherd v. Dean, 13 How. Pr. 173.

678 Wicker v. Dresser, 13 How. Pr. 331.

679 Pettit v. Pettit, 20 Wkly. Dig. 154.

§ 259. Costs.

A judge at chambers cannot tax costs, other than those in an interlocutory proceeding,[680] nor can he grant an extra allowance,[681] but an order for payment of costs may be made at chambers.[682]

§ 260. Appellate proceedings.

The time for making a case or bill of exceptions, cannot be extended, after the time allowed has expired, by a judge out of court.[683]

§ 261. Application to discharge imprisoned debtor.

A judge at chambers cannot entertain an application to discharge an imprisoned debtor.[684]

§ 262. Injunctions.

A judge out of court may grant, dissolve or modify, an injunction.[685]

§ 263. Mandamus.

The right of a judge out of court to grant a writ of mandamus is excluded by section 2068 of the Code providing "except where special provision is made therefor in this article a writ of mandamus can be granted only at a special term of the court," since there is no other provision in the article.[686]

§ 264. Habeas corpus.

A justice of the supreme court can, even when sitting at

[680] Lotti v. Krakauer, 1 City Ct. R. 60, 1 Civ. Proc. R. (McCarty) 312, note; VanSchaick v. Winne, 8 How. Pr. 5.

[681] Mann v. Tyler, 6 How. Pr. 235, 1 Code R., N. S., 382.

[682] Hulsaver v. Wiles, 11 How. Pr. 446.

[683] Doty v. Brown, 3 How. Pr. 375; Hawkins v. Dutchess & Orange Steamboat Co., 7 Cow. 467.

[684] Mather's Case, 14 Abb. Pr. 45.

[685] Peck v. Yorks, 41 Barb. 547.

[686] People ex rel. Lower v. Donovan, 135 N. Y. 76; Matter of Manning, 71 Hun, 236, 54 State Rep. 562.

chambers, award a writ of habeas corpus to any part of the state,[687] notwithstanding the court is at the time in session;[688] but an application to obtain the custody of a minor child, must be to the court, and not to a judge at chambers,[689] though a judge at chambers had such power, prior to Laws 1877, c. 417.[690]

§ 265. Certiorari.

A common law certiorari cannot be allowed by a judge at chambers.[691]

§ 266. Prohibition.

A writ of prohibition cannot be granted by a judge at chambers.[692]

§ 267. Motion to vacate order made out of court.

A motion to vacate an order made at chambers may generally be made before a judge out of court, but the court generally has concurrent power to vacate the order.[693]

§ 268. Examination before trial.

An order requiring the adverse party to appear before an

[687] People ex rel. Bentley v. Hanna, 3 How. Pr. 39; People ex rel. Trainer v. Cooper, 8 How. Pr. 288; People ex rel. Clarke v. Clarke, 64 How. Pr. 7.

[688] Shanks' Case, 15 Abb. Pr., N. S., 38.

[689] People ex rel. Ward v. Ward, 59 How. Pr. 174; People ex rel. Hoyle v. Osborne, 6 Civ. Proc. R. (Browne) 299.

[690] People ex rel. Wilcox v. Wilcox, 22 Barb. 178. The statute taking away such power from a justice of the supreme court at chambers, also deprived the county judge of such power. People ex rel. Parr v. Parr, 121 N. Y. 679.

[691] Gardner v. Commissioners of Highways of Warren, 10 How. Pr. 181; People ex rel. Kilmer v. Cheritree, 4 Thomp. & C. 289; People ex rel. Kilmer v. McDonald, 2 Hun, 70; Code Civ. Proc. § 2127, as amended Laws 1895, c. 946.

[692] Code Civ. Proc. §§ 2092, 2093.

[693] West Side Bank v. Pugsley, 12 Abb. Pr., N. S., 28; People ex rel. Nichols v. Cooper, 57 How. Pr. 463; Woodruff v. Fisher, 17 Barb. 224; Bank of Commerce v. Rutland & W. R. Co., 10 How. Pr. 1; Wicker v. Dresser, 13 How. Pr. 331.

officer and attend the examination of a witness, is an order made out of court, and without notice,[694] as is an order for the examination of a defendant for the purpose of enabling plaintiff to prepare his complaint.[695]

§ 269. Leave to issue execution against decedent's property.

A motion for leave to issue execution against a decedent's property, cannot be heard by a judge out of court, unless by consent.[696]

§ 270. Order extending time to plead.

An order extending the time to answer may be made out of court.[697]

§ 271. Order to show cause.

An order to show cause may be made out of court.[698]

§ 272. What judges may make orders out of court, and transfer of motions.

The right to transfer a motion from one judge to another, and the question as to the particular judge who may make an order out of court, as provided for in Code Civil Procedure, §§ 771, 772, will be treated of in the chapter relating to motions and orders.[699]

§ 273. In first judicial district.

In the first judicial district a motion, which elsewhere must be made in court, may be made to a judge out of court, except for a new trial on the merits.[700] The contention has been

694 Bank of Silver Creek v. Browning, 16 Abb. Pr. 272.
695 Heishon v. Knickerbocker Life Ins. Co., 77 N. Y. 278.
696 Matter of Wadley, 29 Hun, 12.
697 Sisson v. Lawrence, 16 Abb. Pr. 259, note, 25 How. Pr. 435.
698 Matter of Argus Co., 138 N. Y. 557.
699 See post, pp. 602 et seq.
700 Code Civ. Proc. § 770; Disbrow v. Folger, 5 Abb. Pr. 53; Boucicault v. Boucicault, 21 Hun, 431, 59 How. Pr. 131, which holds that "any" application which elsewhere must be made "in court," may here be made "at any time" to a judge out of court. Lachenmeyer v. Lachen-

raised that an application for a writ of mandamus is a motion within the Code provision, but it has been held that, conceding such fact, Code Civ. Proc. § 2068, providing that the writ can be granted only at special terms, save in expressly excepted cases, governs.[701] In the first district, a notice of motion at chambers is sufficient to support a motion at special term.[702]

§ 274. Order.

The order, where made by a judge out of court, should not be in form an order of the court, nor recite that it was made in court at a special term held before the judge who made it,[703] but the fact that an order made at chambers is entitled "at a special term held at chambers," and that there is a direction to enter, does not prevent the order being good as a chamber order, where it is signed by the judge with his initials and his official title is abbreviated.[704]

(B) ATTORNEYS AT LAW.

1. The Vocation.

(a) *General Nature of Vocation.*

§ 275. Definition.

An attorney at law is a person licensed to manage causes in court for the parties thereto. In England, attorneys at law are divided into barristers or counsel, who are advocates admitted to plead at the bar, and solicitors or attorneys who engage in the drawing of pleadings, preparation of evidence, etc. These latter are called "attorneys" in courts of law, "solicitors" in courts of equity, and "proctors" in admiralty. The distinction between barristers and attorneys or solicitors obtained for a time in some of the United States, but is now

meyer, 26 Hun, 542 (order of arrest); Main v. Pope, 16 How. Pr. 271; Geller. v. Hoyt, 7 How. Pr. 265; Lowber v. City of New York, 5 Abb. Pr. 325.

701 People ex rel. Lower v. Donovan, 135 N. Y. 76.

702 Robertson v. Robertson, 9 Daly, 44; Aldrich v. Ketchum, 12 N. Y. Leg. Obs. 319.

703 Lachenmeyer v. Lachenmeyer, 26 Hun, 542.

704 Phinney v. Broschell, 80 N. Y. 544.

obsolete.[705] Formerly, in this state, the offices of attorney and counsel, were distinct, and a person could not be admitted to the bar as a counselor until after three years practice as an attorney. At present, admission to the bar entitles the person admitted to practice as attorney and counselor. The powers, duties and liabilities of one engaged merely as counsel still differ from those of one engaged as the attorney in the case.

§ 276. Distinction between attorney at law and attorney in fact.

A person may be an attorney in fact for another, without being an attorney at law. The two classes of attorneys are sometimes distinguished by the designations attorneys in fact, or private attorneys, and attorneys at law, or public attorneys. The former are those authorized by the principal, either for some particular purpose, or to do a particular act, not of a legal character. The latter are employed to appear for the parties to actions, or other judicial proceedings, and are officers of the courts. So that the mere addition of the word attorney does not of necessity import that the attorney is an officer of the court, or an attorney at law.[706]

§ 277. Right of party to act as his own attorney.

A party to a civil action, who is of full age, may prosecute or defend the same in person or by attorney, at his election, unless he has been judicially declared to be incompetent to manage his affairs.[707] But if a party has an attorney in the action, he cannot appear to act in person, where an attorney may appear or act, either by special provision of law, or by the course and practice of the court.[708]

§ 278. Officer of court.

An attorney is an officer of the courts and not of the state,[709]

[705] Cyc. Law Dict. 76.
[706] Hall v. Sawyer, 47 Barb. 116.
[707] Code Civ. Proc. § 55.
[708] Code Civ. Proc. § 55.
[709] Matter of Burchard, 27 Hun, 429.

and is not within the statutory provision declaring that the office shall become vacant by the incumbent ceasing to be an inhabitant of the state.[710]

§ 278a. Residence.

A person, regularly admitted to practice as attorney, whose law office is within the state, may practice as such attorney, though he resides in an adjoining state.[711]

§ 279. Law clerks.

An attorney is bound by the acts and declarations of his managing clerk,[712] and an execution issued by such clerk is not void.[713]

§ 280. Law partnerships.

All the members of a firm of lawyers are liable for the acts of each,[714] but one forming a partnership with an attorney, after his retainer, and dissolving the relation before collection of the proceeds of the suit, is not liable for the default of his copartner,[715] and, where business was begun by a firm in the name of an individual, the latter may maintain an action for compensation due, in his own name.[716] After dissolution of a partnership, a former client of a firm cannot hold the members individually liable for the subsequent act of one,[717] and, on the death of one, the survivor is not obliged to conduct pending litigation.[718]

710 Richardson v. Brooklyn City & N. R. Co., 22 How. Pr. 368.

711 Code Civ. Proc. § 60. Formerly, it seems, it was held that a non-resident could not practice here. Richardson v. Brooklyn City & N. R. Co., 22 How. Pr. 368.

712 Power v. Kent, 1 Cow. 211; Irvine v. Spring, 35 How. Pr. 479; Birkbeck v. Stafford, 14 Abb. Pr. 285, 23 How. Pr. 236.

713 Brush v. Lee, 36 N. Y. 49, 3 Abb. Pr., N. S., 204, 34 How. Pr. 283.

714 McFarland v. Crary, 6 Wend. 297; Green v. Milbank, 3 Abb. N. C. 138.

715 Ayrault v. Chamberlin, 26 Barb. 83.

716 Platt v. Halen, 23 Wend. 456.

717 Andrews v. DeForest, 22 App. Div. 132.

718 Sterne v. Goep, 20 Hun, 396.

§ 281. Validity of proceedings carried on by one not a lawyer.

A judgment obtained in an action prosecuted by one not an attorney is void,[719] and a summons signed with plaintiff's name by one not an attorney, with a direction to serve the answer at the place of residence of such person, is irregular.[720] Recognition of attorney in a case after his actual admission to the bar waives objection that he was not admitted when he first appeared.[721]

§ 282. Recovery of damages for misconduct.

If any attorney knowingly permits a person, not being his general law partner, or a clerk in his office, to sue out a mandate, or to prosecute or defend an action in his name, he, and the person who so uses his name, each forfeits to the party, against whom the mandate has been sued out, or the action prosecuted or defended, the sum of fifty dollars, to be recovered in an action.[722] A subpoena to testify as a witness is process within the meaning of the above statute, and the fact that the attorney was ignorant of the use of it does not affect the liability of the party using it.[723]

—— **Treble damages.** An attorney or counsellor, who is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or a party, forfeits, to the party injured by his deceit or collusion, treble damages.[724] An attorney or counsellor, who wilfully delays his client's cause, with a view to his own gain, or wilfully receives money, or an allowance for or on account of money, which he has not laid out or become answerable for, forfeits to the party injured, treble damages.[725]

719 Newburger v. Campbell, 9 Daly, 102.

720 Weir v. Slocum, 3 How. Pr. 397, 1 Code R. 105.

721 Parow v. Cary, 1 How. Pr. 66.

722 Code Civ. Proc. § 72.

723 Yorks v. Peck, 31 Barb. 350.

724 Code Civ. Proc. § 70; Pen. Code § 148. This Code provision extends only to deceit and collusion practiced in a suit actually pending. Looff v. Lawton, 97 N. Y. 478. See 2 Abb. Cyc. Dig. 185.

725 Code Civ. Proc. § 71; Pen. Code, § 148.

(*b*) *Admission to Practice and Registration.*

§ 283. Right to apply and examinations.

A citizen of the state, over twenty-one years of age, may apply to practice as an attorney and counselor. Race or sex is no disqualification. A state board of law examiners consisting of three persons hold examinations at least twice a year in each judicial department. The rules for admission to the bar are made by the court of appeals,[726] and are not invalid because they have not been published in the session laws and a copy has not been filed in the office of the clerk of the county as required by Code Civ. Proc., § 57. The requirements of that section are directory only.[727]

§ 284. Necessity of admission to practice.

The admission to the bar of attorneys and counselors-at-law is provided for by rules of the court of appeals in effect January 1, 1896. It is first provided that no person shall be admitted to practice as an attorney or counselor in any court of record in this state, without a regular admission to the bar and license to practice granted by an appellate division of the supreme court.[728]

§ 285. Admission without examination.

Any person who has been admitted to practice, and has practiced three years as an attorney and counselor in the highest court of law in another state, and any person who has thus practiced in another country, or who, being an American citizen and domiciled in a foreign country, has received such diploma or degree therein as would have entitled him, if a citizen of such foreign country, to practice law in its courts, may, in the discretion of an appellate division of the supreme court, be admitted and licensed without an examination. But he must possess the other qualifications required by the rules, and must produce a letter of recommendation from one of the

726 Code Civ. Proc. § 56.
727 Matter of Maxwell, 38 State Rep. 479.
728 Rule 1 of Court of Appeals.

judges of the highest court of law of such other state, or country, or furnish other satisfactory evidence of the character and qualifications.[729] But one who seeks admission upon the ground that he has practiced for three years in the courts of another country, must show that he is a citizen of this country at the time of making his application.[730] An Italian who had practiced for three years in Italy was, however, refused admission to the New York bar on the ground that the systems of jurisprudence in the two countries are entirely different.[731]

—— **After examination.** All other persons may be admitted and licensed upon producing and filing with the supreme court the certificate of the state board of law examiners that the applicant has satisfactorily passed the examination and has complied with the rules, and upon producing and filing with the court evidence of good moral character, which may be shown by the certificate of the attorney with whom he has passed his clerkship, or by some attorney in the town or city where he resides, but such certificate shall not be conclusive, and the court may make further examination and inquiry.[732] Applicants for admission as attorneys and counselors who have passed the examination prescribed by the rules of the court of appeals, shall file the certificates of the examiners, with evidence of character, with the clerk of the appellate division of the proper department at such times as shall be directed by special order, or by rules of the court in such department.[733] The discretionary power of the supreme court cannot, ordinarily, be reviewed or interfered with by the court of appeals.[734]

§ 286. Taking oath of office.

An attorney must, on his admission, take the constitutional oath of office in open court.[735]

729 Rule 2 of Court of Appeals.
730 Matter of O'Neill, 90 N. Y. 584.
731 Matter of Maggio, 27 App. Div. 129.
732 Rule 3 of Court of Appeals.
733 Rule 1 of Supreme Court.
734 Matter of Beggs, 67 N. Y. 120.
735 Code Civ. Proc. § 59.

§ 287. Affidavit of applicant as condition to examination.

In order to be entitled to take an examination, the applicant must show by his affidavit that he is a citizen of the United States, a resident of the state, of the age of twenty-one, that he has not been examined within three months, that he has studied law three years (two years where college graudate and one year where admitted in another state in which applicant has practiced for at least a year).[736]

§ 288. Manner of spending term of study.

The period of study may be by serving a regular clerkship in a law office of a practising attorney or by attending a law school or by a combination of both school and clerkship. Applicants not college graduates or members of the bar of another state or country, must have passed a regent's examination in certain subjects before entering on the clerkship or attendance at law school, or within a year thereafter. The attorney with whom a clerkship is commenced must file a certificate thereof at the time with the clerk of the court of appeals.[737]

§ 289. Proof of conditions precedent to examination.

The state board of law examiners, before admitting an applicant to an examination, require proof of the preliminary conditions. Where the applicant is a college graduate, his diploma or certificate of graduation, must be shown. Admission to bar of another state or country is proved by the license or certificate, while service of regular clerkship is proved by certified copy of attorney's certificate of commencement of study, as filed with the clerk of the court of appeals. The time of study allowed in a law school may be proved by certificate of teacher under seal of the school. Passing of regents' examination is proved by certified copy of the regent's certifi-

[736] Rule 4 of the Rules of the Court of Appeals.

See Matter of Simpson, 167 N. Y. 403 for construction of provision as to one year study where applicant has been admitted to practice in another state or country.

[737] Rule 5 of Court of Appeals.

cate. Other proof may be accepted in the discretion of the board of law examiners.[738]

§ 290. Filing of certificates nunc pro tunc.

A certificate required may be filed nunc pro tunc where the filing has been omitted by excusable mistake, or without fault.[739]

§ 291. Right to appeal.

An order denying the application for admission to practice as an attorney, is appealable to the court of appeals as an order in a special proceeding, affecting a substantial right.[740]

§ 292. Registration of attorneys.

A recent statute requires, under penalty of being guilty of a misdemeanor, every licensed attorney admitted to practice, to subscribe and take an oath or affirmation, stating citizenship, residence, time of admission to the bar, and taking of oath of office. The statute also applies to persons subsequently licensed and admitted to practice. The oaths or affirmations are filed by the clerk of the court of appeals and he enters them, as compiled, in a book known as the "official register of attorneys and counselors-at-law in the state of New York."[741]

The form of the oath may be as follows:

State of New York, } ss.:
———, County. }

I ———, being duly * * *, do depose and say that I am a ——— citizen of the United States ——— and now reside at ———.

That I was duly and regularly licensed and admitted to practice as an attorney and counsellor at law in the courts of record of this state, at the ——— term, 1——, of the ——— of the ——— court ——— held at ——— and that I took the constitutional oath of office.

[Jurat.] [Signature.]

738 Rule 6 of Court of Appeals.

739 Rule 7 of Court of Appeals.

740 Matter of Cooper, 22 N. Y. 67, more fully reported, sub. nom. Matter of the Graduates, 11 Abb. Pr. 301; Matter of the Graduates of Law School of Columbia College, 10 Abb. Pr. 357, 19 How. Pr. 136; Matter of Beggs, 67 N. Y. 120.

741 Laws 1898, c. 169. Amended by Laws 1899, c. 225.

(c) *Exemptions, Disabilities, and Liabilities to Third Persons.*

§ 293. **Exemptions.**

At common law and prior to the Revised Statutes, an attorney was exempted from arrest or being sued during the actual sitting of the court of which he was an officer, if he was employed in some cause pending, and then to be heard in such court, sundo, morando, redeundo (which means going, remaining, and returning), but the Revised Statutes (part III, chapter 3, title 2, section 86), changed the law so as to restrict the privilege so that they were "exempt from arrest during the sitting of the court of which he is an officer," if he was "employed in some cause pending and then to be heard in such court," and it was held thereunder that papers could be served on an attorney in open court, though the practice was condemned.[742]

—— **Privileged communications.** Words uttered by an attorney in a judicial proceeding are privileged, provided they are material to the issue, although spoken maliciously.[743] Statements of counsel, in giving advice, are privileged.[744] In respect to the writings used in the course of judicial proceedings, counsel conducting such proceedings are privileged when the writings are material and pertinent to the questions involved, or where they may possibly be pertinent thereto,[745] or where the writing is in good faith under the belief that it is pertinent and material.[746] A person trying his own case, though not a lawyer, is privileged,[747] but an attorney who has abandoned the profession is not privileged.[748]

§ 294. **Disabilities and disqualifications.**

An attorney cannot become surety on any undertaking or

742 National Press Intelligence Co. v. Brooke, 18 Misc. 373.

743 Marsh v. Elsworth, 36 How. Pr. 532, 31 Super. Ct. (1 Sweeny) 52; Perzel v. Tousey, 52 Super. Ct. (20 J. & S.) 79; Ring v. Wheeler, 7 Cow. 725.

744 Washburn v. Cooke, 3 Denio, 110.

745 Youmans v. Smith, 153 N. Y. 214; Dada v. Piper, 41 Hun, 254; Hastings v. Lusk, 22 Wend. 410.

746 Aylesworth v. St. John, 25 Hun, 156.

747 Hastings v. Lusk, 22 Wend. 410.

748 Brooks v. Patterson, Col. & C. Cas. 133.

bond required from his client in an action or proceeding, or be bail in any case or proceeding,[749] even though the attorney is the real party in interest, where he does not appear on the record as a party,[750] but this rule does not apply to an attorney who has retired from practice for a year or more, or permanently,[751] though the mere fact that the attorney states that he is not in active practice is not sufficient to authorize the court to accept him as bail.[752] The rule does not apply to bonds on an appeal from a justice of the peace.[753] It seems that the attorney, if not rejected as surety, is liable on a bond signed by him, since such a bond is not void.[754]

—— **Acting for both prosecution and defense.** A law partner of the attorney general, a district attorney, or other public prosecutor, cannot take any part in the defense of an action or proceeding carried on by such prosecutor.[755] An attorney who has been in any way connected with the prosecution of an action or special proceeding, as public prosecutor, cannot in any way assist in the defense or receive fees therefor.[756]

§ 295. Liabilities to third persons.

An attorney who causes void or irregular process to be issued, which occasions loss or injury to a party against whom it is enforced, is liable for the damages thereby occasioned, but if the process is irregular merely because of failure to perform some preliminary requisite, it must be vacated before an action is brought against the attorney.[757] Attorneys are not liable individually where it appears that the person injured knew that they were acting as such for disclosed principals.[758]

749 Rule 5 of General Rules of Practice.

750 Roebee v. Bowe, N. Y. Daily Reg., April 5, 1881.

751 Evans v. Harris, 13 Wkly. Dig. 42; Phillips v. Wortendyke, 5 Month. Law Bul. 90, N. Y. Daily Reg., Oct. 8, 1883; Stringham v. Stewart, 3 How. Pr., N. S., 214, 8 Civ. Proc. R. (Browne) 420.

752 Wheeler v. Wilcox, 7 Abb. Pr. 73.

753 Lawler v. Van Aernam, 22 Alb. Law J. 156.

754 Hubbard v. Gicquel, 14 Civ. Proc. R. (Browne) 15; American Surety Co. v. Crow, 22 Misc. 573.

755 Code Civ. Proc. § 78.

756 Code Civ. Proc. § 79.

757 Fischer v. Langbein, 103 N. Y. 84.

758 Hicks v. Chittenden, 3 State Rep. 554.

An attorney who swears to an information under which a warrant is issued, may be liable for malicious proseeution,[759] but he is not liable to a person imprisoned by erroneous proceedings, after action by a court of competent jurisdiction,[760] and he is not ordinarily liable for an illegal arrest,[761] nor for an illegal levy of execution, where he acts merely in his professional capacity,[762] but where an attorney refused to state whether he acted under his client's instructions in issuing execution, he cannot thereafter deny his individual liability.[763]

—— **Repayment of moneys received.** He is liable for the amount of an illegal elaim paid to him by a public officer without authority, although the money was turned over to his client,[764] and may be compelled by order to restore money received by virtue of an order subsequently reversed,[765] but he is not liable to the next friend after paying over to plaintiff moneys colleeted, without notice of the claim of the next friend.[766] The adverse party, on paying more costs than the attorney was authorized by law to reeeive, may recover back the excess.[767]

—— **Liability to persons employed for client.** An attorney is not personally liable to a person in the service of his client, employed by him with the client's authority,[768] as where an attorney employs a bookkeeper, with the consent of his elients, to examine the books of a partnership, to prepare a ease for trial.[769] However, an attorney is liable for the value of the services of another attorney employed by him.[770]

759 Whitney v. New York Casualty Ins. Ass'n, 27 App. Div. 320.

760 Fischer v. Langbein, 10 Abb. N. C. 128, 62 How. Pr. 238.

761 Hunter v. Burtis, 10 Wend. 358. But see Sleight v. Leavenworth, 12 Super. Ct. (5 Duer) 122, where attorney was held liable for arrest under execution not warranted by any judgment.

762 Ford v. Williams, 13 N. Y. (3 Kern.) 577.

763 Ford v. Williams, 24 N. Y. 359.

764 People v. Fields, 58 N. Y. 491.

765 Forstman v. Schulting, 108 N. Y. 110, 13 State Rep. 483.

766 Leopold v. Myers, 2 Hilt. 580, 10 Abb. Pr. 40.

767 Moulton v. Bennett, 18 Wend. 586.

768 Covell v. Hart, 14 Hun, 252.

769 Covell v. Hart, 14 Hun, 252.

770 Dulon v. Camp, 28 Misc. 548; Matter of Hynes, 105 N. Y. 560; Meany v. Rosenberg, 28 Misc. 520.

—— **Liability on purchase at judicial sale.** An attorney purchasing property at a judicial sale, in his own name, is presumed to be individually liable therefor.[771]

(d) Disbarment of Attorney.

§ 296. Grounds.

An attorney and counselor, who is guilty of any deceit, malpractice, crime or misdemeanor, or who is guilty of any fraud or deceit in proceedings by which he was admitted to practice as an attorney and counselor of the courts of record of this state, may be suspended from practice, or removed from office, by the appellate division of the supreme court.[772] Malpractice has been held to mean evil practice in a professional capacity, and the resort to methods and practices unsanctioned and prohibited by law,[773] while the term "deceit" has been construed as implying concealment or false suggestion to injure a party or mislead a court while acting in a professional capacity or in the course of professional employment,[774] it not being necessary that the deceit be practiced in a suit actually pending in court.[775] Thus disbarment has been ordered for converting moneys given to an attorney to be used for a particular purpose,[776] for retaining money given to settle a criminal proceeding, and taking unlawful possession of property,[777] for manufacturing evidence,[778] for using a deposition, the questions and answers in which were prepared by the attorney himself, although assented to by the witness,[779] for giving to the other

[771] Chappell v. Dann, 21 Barb. 17.

[772] Code Civ. Proc. § 67; Matter of Goldberg, 49 App. Div. 357.

[773] Matter of Post, 54 Hun, 634, 26 State Rep. 641, 7 N. Y. Supp. 438; Matter of Baum, 30 State Rep. 174, 55 Hun, 611, 8 N. Y. Supp. 771.

[774] Matter of Post, 26 State Rep. 641, 54 Hun, 634, 7 N. Y. Supp. 438.

[775] Matter of Peterson, 3 Paige, 510.

[776] Matter of Burd, 9 Wkly. Dig. 562.

[777] Matter of Titus, 50 State Rep. 636, 66 Hun, 632, 21 N. Y. Supp. 724; Matter of Bleakley, 5 Paige, 311; People ex rel. Whillis v. Brotherson, 36 Barb. 662.

[778] Matter of Gale, 75 N. Y. 526.

[779] Matter of Eldridge, 82 N. Y. 161.

side valuable letters received from his client, to the prejudice of the client,[780] for altering records[781] such as an undertaking, and using it, without re-execution, in another court,[782] for forging the certificate purporting to be a copy of an order declaring a marriage void,[783] for reiterating an attack upon the character of a judge, by charging him with corruption,[784] for imposing upon the court by setting up a counterclaim which had been merged in a former judgment,[785] and for making unconscionable charges.[786] A criminal act, although indictable, does not work a forfeiture of office unless the offense be one which would disqualify the attorney as a witness, or was committed by him in his professional capacity,[787] and hence drawing a check upon a bank in which the attorney has no money is not ground for disbarment.[788] The fact that acts of professional misconduct are also felonies does not prevent a removal, although, if the charge involves a crime distinct from professional action, the criminal trial should first take place.[789]

—— **Misdemeanors.** Among the misdemeanors which are ground for removal, the civil and penal Codes enumerate (a) deceit or collusion, or consent thereto, in an action or proceeding, with intent to deceive the court or a party;[790] (b) or willful delaying client's suit with view to attorney's own gain or willfully receiving money not laid out or become answerable for;[791] (c) or knowingly permitting name to be used by one other than partner or clerk, in suing out process, etc., except where action

780 Matter of Hahn, 11 Abb. N. C. 423.

781 Alteration of verification. Matter of Loew, 5 Hun, 462.

782 Matter of Goldberg, 61 State Rep. 277, 79 Hun, 616, 29 N. Y. Supp. 972.

783 Matter of Peterson, 3 Paige, 510.

784 Matter of Murray, 33 State Rep. 831, 58 Hun, 604, 11 N. Y. Supp. 336.

785 Matter of V———, 10 App. Div. 491.

786 In re Powers, 13 Wkly. Dig. 476; Matter of ———, 86 N. Y. 563.

787 Bank of New York v. Stryker, 1 Wheeler Cr. Cas. 330.

788 Bank of New York v. Stryker, 1 Wheeler Cr. Cas. 330.

789 Rochester Bar Ass'n v. Dorthy, 152 N. Y. 596.

790 Code Civ. Proc. § 70; Pen. Code § 148.

Deceit or collusion must be practiced in suit actually pending. Looff v. Lawton, 97 N. Y. 478.

791 Code Civ. Proc. § 71; Pen. Code § 148.

is prosecuted or defended in the name of the people;[792] (d) or defending a prosecution in which he has been connected as public prosecutor;[793] (e) or directly or indirectly, buying, or being in any manner interested in buying, a bond, promissory note, bill of exchange, book-debt, or other thing in action, with the intent and for the purpose of bringing an action thereon;[794] (f) or either before or after action brought, promising or giving, or procuring to be promised or given, a valuable consideration to any person, as an inducement to placing, or in consideration of having placed, in his hands, or in the hands of another person, a demand of any kind, for the purpose of bringing an action thereon, except that an agreement between attorneys and counsellors, or either, to divide between themselves the compensation to be received, is lawful.[795]

But an attorney or counsellor may receive a bond, promissory note, bill of exchange, book-debt, or other thing in action, in payment for property sold, or for services actually rendered, or for a debt antecedently contracted, or may buy or receive a bill of exchange, draft, or other thing in action, for the purpose of remittance.[796]

—— **Conviction of felony.** An attorney convicted of a felony, shall, upon such conviction, cease to be an attorney, or to be competent to practice law as such. In such case, there may be presented to the appellate division of the supreme court a certified or exemplified copy of the judgment of such conviction, and thereupon the name of the person so convicted, shall, by order of the court, be stricken from the roll of attorneys. Upon a reversal of such conviction, or pardon by the president of the United States or governor of this state, the appellate division has power to vacate or modify such order of debarment,[797] but the issuance of a pardon will not, as a

[792] Pen. Code §§ 149, 150.

[793] Pen. Code § 670; Code Civ. Proc. §§ 78, 79.

[794] Code Civ. Proc. § 73. For a full discussion of this Code provision as to champerty, see post, §§ 310-313; Matter of Bleakley, 5 Paige, 311.

[795] Code Civ. Proc. § 74. For a full discussion of this Code provision, see post, §§ 310-313.

[796] Code Civ. Proc. § 76.

[797] Code Civ. Proc. § 67, as amended L. 1890, c. 528, L. 1891, c. 99,

matter of course, induce the court to replace the attorney's name on the rolls. His character and fitness to practice will be also considered.[798]

—— **Loss of moral character.** Ceasing to possess moral qualifications for admission is ground for removal.[799]

—— **Acts committed by attorney as a party.** An attorney cannot be disbarred for acts committed by him as a party, especially where he has already been punished for his acts as such,[800] except as specially provided for by the Code where an attorney buys a claim for the purpose of suing thereon and does sue thereon or pays for placing a claim in his hands to be sued on.[801]

—— **License obtained without authority.** A license obtained without authority may be revoked in a summary proceeding at a general term of the supreme court, though the applicant is not injuriously affected thereby,[802] and it is no objection to a motion for revocation that it is made by another attorney.[803]

§ 297. Proceedings.

Disbarment proceedings must be instituted before the appellate division of the supreme court upon authenticated papers or by an order of some other court. They cannot be instituted by motion and notice.[804] In case the supreme court believes that a prima facie case is shown, it will issue an order to show cause, which will be served with the papers upon the attorney personally.[805] The supreme court, of its own motion, should cause charges to be preferred, when the ends of justice require it.[806] Before an attorney is suspended or removed, a copy of the

and L. 1895, c. 946; Matter of Niles, 5 Daly, 465, in which it was held immaterial that an alleged order disbarring him could not be found. Matter of E———, 65 How. Pr. 171.

798 In re Powers, 13 Wkly. Dig. 476.

799 In re Percy, 36 N. Y. 651.

800 Matter of Post, 26 State Rep. 641, 54 Hun, 634, 7 N. Y. Supp. 438.

801 Code Civ. Proc. § 77.

802 Matter of Burchard, 27 Hun, 429.

803 Matter of O'Neill, 27 Hun, 599.

804 Matter of Brewster, 12 Hun, 109.

805 In re Percy, 36 N. Y. 651.

806 In re Percy, 36 N. Y. 651.

charges against him must be delivered to him, and he must be allowed an opportunity of being heard in his defense.[807] It seems that if the attorney denies the charges, the issue should be tried by the court or a referee in the same manner as other issues in a civil case, with the right reserved to the attorney to see and cross-examine the witnesses, and to insist that the rules of evidence be observed.[808] A commission to take testimony without the state cannot issue except upon the attorney's consent.[809]

—— **District attorney as prosecutor.** It is the duty of any district attorney within the department, when so designated by the appellate division of the supreme court, to prosecute all cases for the removal or suspension of attorneys and counselors.[810]

—— **Evidence.** The affidavits and papers upon which the proceedings were instituted, are not admissible as evidence inasmuch as the common law rules of evidence apply to a trial of the issues,[811] so that a refusal of the attorney to testify raises a presumption of the truth of the matters charged, where they must have been within the attorney's personal knowledge.[812] The evidence must be sufficient to establish guilt beyond serious doubt.[813]

—— **Punishment.** The disbarment may be for a limited period. An attorney guilty of professional misconduct who was young and inexperienced, was suspended from practice for two years.[814]

§ 298. Effect of disbarment.

The suspension or removal of an attorney or counsellor, by

[807] Code Civ. Proc. § 68. Amended by Laws 1903, c. 377, so as to permit, in certain instances, service of notice by mail.

[808] Matter of Eldridge, 82 N. Y. 161.

[809] Matter of an Attorney, 83 N. Y. 164; Matter of Hahn, 23 Alb. Law J. 129.

[810] Code Civ. Proc. § 68, as amended L. 1890, c. 528; L. 1895, c. 946, and L. 1896, c. 557.

[811] Matter of Eldridge, 82 N. Y. 161.

[812] Association of the Bar v. Randel, 158 N. Y. 216.

[813] Matter of ———, 1 Hun, 321; Matter of Mashbir, 44 App. Div. 632.

[814] Matter of Goldberg, 79 Hun, 616, 29 N. Y. Supp. 972.

the supreme court, operates as a suspension or removal in every court of the state.[815]

§ 299. Costs.

On an application to disbar an attorney, when instituted by an attorney in bad faith, the court may impose costs and disbursements, on denying the application, to be paid by the applicant.[816]

2. The General Relation With the Client.

§ 300. Attorney as agent.

The principles regulating the relation of principal and agent are applicable to attorney and client.[817]

§ 301. Creation of relation.

The relation of attorney and client is usually created by the giving of a retainer. The rules applicable to all contracts of employment as agent apply generally.[818] An agreement for the collection of a claim, contemplating legal proceedings if necessary, creates the relation,[819] and an employment will be sustained on evidence that plaintiff was requested to act by defendant's attorney, and that the defendant was present when it was announced that plaintiff was retained as counsel, and that plaintiff appeared during the hearing.[820] Ratification of the employment of an attorney may be inferred from the party's statement, on presentation of a bill for services, that the matter was in charge of the attorney of record who had employed the plaintiff.[821] Consenting that the attorneys of the lender should examine title on application for a loan, does not establish the relation.[822]

815 Code Civ. Proc. § 69.
816 Matter of Kelly, 59 N. Y. 595.
817 Brock v. Barnes, 40 Barb. 521.
818 2 Abb. Cyc. Dig. 172.
819 Matter of Tracy, 1 App. Div. 113, 72 State Rep. 219.
820 Tucker v. Staunton, 20 Wkly. Dig. 43.
821 Bratt v. Scott, 44 State Rep. 727, 63 Hun, 632, 18 N. Y. Supp. 507.
822 Norwood v. Barcalow, 6 Daly, 117.

§ 302. Knowledge of attorney as notice to his client.

As a general rule, the client is chargeable with notice of facts of which the attorney has obtained knowledge in the conduct of the cause or in the business of the client. How far such knowledge is in any case to be imputed to the client depends on the nature of the information, the existence of it in the mind of the attorney at the particular time, and the manner in which it was communicated. The client is not ordinarily chargeable with the knowledge which his attorney may have of a particular fact, unless it was obtained in the conduct of the cause, or in the business of the client, or was present to his mind at the time.[823] The termination of the attorney's employment before it became his duty to communicate facts to his client, precludes the knowledge of the attorney from being notice to the client.[824] A client is presumed to have notice of the proceedings of his attorney where he is the sole defendant,[825] and costs fixed as the condition of a favor to the client are sufficiently demanded by giving notice to the attorney,[826] but notice to an attorney of an assignment of a judgment, is not notice to the client.[827]

§ 303. Compelling disclosure of client's address.

It is the duty of an attorney, as an officer of the court, to furnish the address of his client when the court orders it,[828] under penalty of a stay of proceedings or payment of costs,[829] but the order will not be granted unless some specific object or

[823] Constant v. University of Rochester, 111 N. Y. 604; Slattery v. Schwannecke, 118 N. Y. 543; Denton v. Ontario County Nat. Bank, 150 N. Y. 126; McCutcheon v. Dittman, 23 App. Div. 285; Griffith v. Griffith, 9 Paige, 315; Howard Ins. Co. v. Halsey, 8 N. Y. (4 Seld.) 271.

[824] Howard Ins. Co. v. Halsey, 6 Super. Ct. (4 Sandf.) 565.

[825] Wright v. Nostrand, 94 N. Y. 31.

[826] Hanna v. Dexter, 15 Abb. Pr. 135.

[827] Ketchum v. Williams, 7 N. Y. Leg. Obs. 181.

[828] Baur v. Betz, 1 How. Pr., N. S., 344, 7 Civ. Proc. R. (Browne) 233; Post v. Scheider, 36 State Rep. 324, 59 Hun, 619, 13 N. Y. Supp. 396.

[829] Post v. Scheider, 36 State Rep. 324, 59 Hun, 619, 13 N. Y. Supp. 396; Baur v. Betz, 1 How. Pr., N. S., 344, 7 Civ. Proc. R. (Browne) 233.

reason be shown therefor,[830] and will be refused where the attorney had offered in writing to furnish the information if it was desired for any purpose connected with the suit,[831] or after an affirmance of a judgment for the adverse party.[832] It will be required for the purpose of examination before trial, or where the facts tend to show that the suit is being prosecuted without authority,[833] and an attorney bringing suits on behalf of a number of persons against the same defendant may be required to disclose the addresses of the clients.[834] The practice, where the disclosure is to enable service, is to first use diligence in attempting to procure service and, on failure, to request the attorney to furnish the address of his client. In case he refuses, a motion, supported by affidavits, should be made and the prayer be for an order or order to show cause, and a stay of proceedings in the meantime.

§ 304. Dealings between attorney and client.

Dealings between attorney and client will be closely scrutinized and the burden of proof rests on the attorney to show that the transactions are just and fair.[835]

§ 305. Acquiring subject-matter of suit.

An attorney cannot ordinarily acquire the subject-matter of the suit, as by purchase at judicial sale, and where he does purchase, he holds as trustee for his client.[836]

§ 306. Malpractice.

It is not within the province of a book on practice to discuss

[830] Corbett v. DeComeau, 1 Month. Law Bul. 30; Friedberg v. Bates, 3 Month. Law Bul. 6.

[831] Drake v. New York Iron Mine, 75 Hun, 539, 57 State Rep. 657.

[832] Walton v. Fairchild, 4 N. Y. Supp. 552.

[833] Corbett v. Gibson, 18 Hun, 49.

[834] Ninety-nine Plaintiffs v. Vanderbilt, 1 Abb. Pr. 193, 11 Super. Ct. (4 Duer) 632.

[835] This rule does not, however, apply to a contract employing an attorney to bring an action. Clifford v. Braun, 71 App. Div. 432. Compare cases in 2 Abb. Cyc. Dig. 188-193.

[836] Yeoman v. Townshend, 74 Hun, 625, 2 Abb. Cyc. Dig. 186, 187.

when a cause of action arises in favor of the client against h attorney or whether the ignorance or neglect of the attorney is such as to preclude a recovery of compensation for his services.[837] However, it is proper to state that the general rule is that every attorney and counselor shall possess and use adequate skill and learning, and shall employ them in every way, according to the importance and intricacy of the case; and if a cause miscarries in consequence of culpable neglect or gross ignorance of an attorney, he can recover no compensation for any services which he has rendered, but which were useless to his client by reason of his neglect or ignorance.[838] They are not to be held responsible for errors of judgment which may arise when that degree of care and attention has been devoted to their professional employment, as is ordinarily devoted by persons reasonably competent, experienced and well qualified for the discharge of professional duties of this description. But if they fail to inform themselves of statutory provisions, or well settled principles of law, readily accessible by means of ordinary care, attention and investigation, and in consequence of that failure the business committed to them is mismanaged, and the person or persons employing them are in that manner deprived of their legal rights, there they will not only forfeit all legal claim for compensation, but in addition to that be justly held responsible for any loss or injury sustained by means of such misconduct, by the person or persons for whom they may be employed.[839]

§ 307. Compensation.

The Code provides that the compensation of an attorney or counsellor for his services is governed by agreement, express or implied, which is not restrained by law,[840] but the Code provision does not deprive courts of the superintending power always exercised over arrangements between attorney and

[837] For a collection of the authorities, see 2 Abb. Cyc. Dig. 182-185.

[838] Von Wallhoffen v. Newcombe, 10 Hun, 236; Patterson v. Powell, 31 Misc. 250; Kissam v. Bremerman, 44 App. Div. 588.

[839] Carter v. Tallcot, 36 Hun, 393.

[840] Code Civ. Proc. § 66, as amended L. 1879, c. 542, and L. 1899, c. 61.

client, to prevent oppression and fraud.[841] The question of champerty and maintenance, embracing the right to agree on a contingent fee and for the attorney to stipulate to pay all costs and expenses, is fully discussed hereafter.[842] The taxable costs are not the measure of compensation for the services of an attorney in an action or proceeding, in the absence of a special agreement to such effect.[843]

—— **Title to costs.** The decisions are directly in conflict as to whether the costs belong to the attorney or his client. On the one hand, there is a line of cases which hold that the costs recovered in an action belong to the attorney, without any assignment, and that the claim of the attorney thereto is superior to the right of the adverse party to set off claims against the successful party.[844] On the other hand, it is held that the costs belong to the party and that the attorney simply has a lien thereon for his compensation.[845] The latter holding seems to be the correct one as it is believed that the cases holding that the attorney owns the costs are largely based on the decision of the commission of appeals in Marshall v. Meech[846] which did not hold that the attorney owns the costs but merely held that the attorney's lien extended to the costs and that "to the amount of such lien, the attorney is to be deemed an equitable assignee of the judgment. To the extent of the taxed costs entered in the judgment, the judgment itself is legal notice of the lien, and this lien cannot be discharged by payment to any one but the attorney. The judgment debtor pays these costs to the party at his peril." Suppose that, immediately after the rendition of judgment, the client pays his attorney in full. Does the attorney still "own" the costs? It seems more rea-

841 Barry v. Whitney, 5 Super. Ct. (3 Sandf.) 696.

842 See post, §§ 310-313.

843 Starin v. City of New York, 106 N. Y. 82; Betts v. Betts, 4 Abb. N. C. 317, 440.

844 Delaney v. Miller, 65 State Rep. 834; Tunstall v. Winton, 31 Hun, 219; Matter of Bailey, 31 Hun, 608; Marshall v. Meech, 51 N. Y. 140; Ennis v. Curry, 22 Hun, 584; Kult v. Nelson, 25 Misc. 238; Adams v. Stillman, 4 Misc. 259.

845 Taylor v. Long Island R. Co., 25 Misc. 11; Wheaton v. Newcombe, 48 Super. Ct. (16 J. & S.) 215. See Hayes v. Carr, 44 Hun, 372.

846 Marshall v. Meech, 51 N. Y. 140.

sonable to say that in such case his "lien" is extinguished. It has also been held that wherever the legal title to costs may be as between attorney and client before collection, after they have been collected by the attorney his lien upon them has been reduced to possession, and the client cannot insist upon their payment to him in the absence of a special agreement entitling him to receive them.[847]

§ 308. Termination of relation by act of attorney.

An attorney may terminate his employment, without forfeiting his right to compensation, where there is cause. In Tenney v. Berger[848] it was held that there was just cause for terminating the relation, where the client introduces into the case, against the attorney's consent, counsel against whom the attorney has objection and with whom he is unwilling to be associated. Judge Earl, in that case, said: "the rule is that an attorney who is retained generally to conduct a legal proceeding enters into an entire contract to conduct the proceeding to its termination, and that he cannot abandon the service of his client without justifiable cause, and reasonable notice. * * * If an attorney, without just cause, abandons his client before the proceeding for which he was retained has been conducted to its termination, he forfeits all right to payment for any services which he has rendered. The contract being entire he must perform it entirely, in order to earn his compensation, and he is in the same position as any person who is engaged in rendering an entire service, who must show full performance before he can recover the stipulated compensation. * * * What shall be a sufficient cause to justify an attorney in abandoning a case in which he has been retained has not been laid down in any general rule, and cannot be. If the client refuses to advance money to pay the expenses of the litigation, or if he unreasonably refuses to advance money during the progress of a long litigation to his attorney to apply upon his compensation, sufficient cause may thus be furnished to justify the attorney in withdrawing from the service of his client. So any

[847] Matter of Barnes, 146 N. Y. 468.

[848] Tenney v. Berger, 93 N. Y. 524. See, also, Pickard v. Pickard, 93 Hun, 338.

conduct on the part of the client, during the progress of the litigation, which would tend to degrade or humiliate the attorney, such as attempting to sustain his case by the subornation of witnesses or any other unjustifiable means, would furnish sufficient cause. * * * We do not think that the rule that an attorney is bound to an entire contract should be very rigidly enforced, while the client is left with the right arbitrarily to discharge him at any time."

§ 309. Termination of authority by reason of extrinsic events.

The authority of an attorney, by virtue of an original retainer in a suit, continues until final judgment is actually perfected, and as a general rule and for general purposes, no longer. There are certain purposes for which it is prolonged, such as the issuing of execution or other things necessary to the collection and satisfaction of the judgment; and he may by statute acknowledge satisfaction at any time within two years. Before the statute he could not acknowledge satisfaction without a new warrant for the purpose. While the suit is progressing, his authority is large. He may make stipulations, waive technical advantages, arbitrate or refer, discontinue or remit damages, and almost discharge the debt without satisfaction. This large discretion, while he is controlling the cause, ends when judgment is perfected. The warrant of attorney is quousque placitum terminatur.[849] It has been held that the attorney may stipulate to postpone an execution,[850] or, on payment of judgment to him, may authorize the sheriff to discharge the imprisoned defendant,[851] or may institute supplementary proceedings,[852] and motion papers to set aside a judgment may be served upon plaintiff's attorneys several years

[849] Walradt v. Maynard, 3 Barb. 584; Cruikshank v. Goodwin, 49 State Rep. 603; Lusk v. Hastings, 1 Hill, 656; Egan v. Rooney, 38 How. Pr. 121; Davis v. Solomon, 25 Misc. 695, 28 Civ. Proc. R. (Kerr) 420.

Power to satisfy judgment within two years, see Code Civ. Proc. § 1260.

[850] Read v. French, 28 N. Y. 285.

[851] Davis v. Bowe, 118 N. Y. 55.

[852] Ward v. Roy, 69 N. Y. 96.

after entry of the judgment.[853] On the other hand, it has been held that an attorney cannot, more than a year after judgment, consent to amendment of the proceedings nunc pro tunc,[854] and that a notice of motion to satisfy a judgment on the record must be served upon the party.[855] Justice Ward, in a late case, states the true rule to be that, for all purposes of collecting the judgment, or to vacate, modify or reverse it, the power of the attorney of record continues with the presumed assent of his client until some affirmative steps are taken by the client to dismiss him from the case, or some of the causes intervene specified in section 65 of the Code.[856]

—— **Transfer of cause of action or judgment.** The relation is dissolved by the transfer of the subject-matter of the suit, or of the judgment, to another, with the knowledge of the attorney.[857]

—— **Death of client.** Death of the client terminates the attorney's authority,[858] and he cannot thereafter institute supplementary proceedings.[859] His interest in the costs will not sustain a judgment rendered after the client's death.[860]

—— **Lapse of time.** The relation is not necessarily terminated by a long suspension of proceedings.[861]

3. Champerty and Maintenance.

§ 310. Common law and Code rules.

Maintenance, at common law, was said to consist in the un-

[853] Miller v. Miller, 37 How. Pr. 1; Drury v. Russell, 27 How. Pr. 130.

[854] Walter v. De Graaf, 19 Abb. N. C. 406.

[855] Schmidt v. Lau, 1 Month. Law Bul. 32.

[856] Commercial Bank v. Foltz, 13 App. Div. 603.

[857] Robinson v. Brennan, 90 N. Y. 208; Foster v. Bookwalter, 152 N. Y. 166.

[858] Skinner v. Busse, 38 Misc. 265; Balbi v. Duvet, 3 Edw. Ch. 418; Putnam v. Van Buren, 7 How. Pr. 31; Bellinger v. Ford, 21 Barb. 311; Livingston v. Olyphant, 26 Super. Ct. (3 Rob.) 639; Amore v. La Mothe, 5 Abb. N. C. 146; Lapaugh v. Wilson, 43 Hun, 619; Avery v. Jacob, 59 Super. Ct. (27 J. & S.) 585; Hickox v. Weaver, 15 Hun, 375; Fuller v. Williams, 7 Cow. 53.

[859] Amore v. La Mothe, 5 Abb. N. C. 146.

[860] Piering v. Henkel, 18 State Rep. 823.

[861] Bathgate v. Haskin, 59 N. Y. 533.

lawful taking in hand, or upholding, of quarrels or sides, to the disturbance or hindrance of common right. It was of two kinds, namely, ruralis, or in the country, and curialis, or in the courts. Maintenance ruralis was termed "champerty," and was committed where one upheld a controversy under a contract to have a part of the property or subject in dispute. Maintenance curialis was usually alone termed "maintenance," and was committed where one officiously, and without just cause, inter-meddled in and promoted the prosecution or defense of a suit, in which he had no interest, by assisting either party with money or otherwise.[862] A man might, however, maintain the suit of his near kinsman, servant or poor neighbor out of charity and compassion, with impunity.[863] The punishment at common law was by fine and imprisonment.[864] Champerty has also been defined as a bargain with a plaintiff or defendant to divide the land or other matter sued for between them, if they prevail at law, whereupon the champertor is to carry on the party's suit at his own expense. In a more modern sense of the word, it signifies the purchasing of a suit or right of suing, and it was a practice so abhorred by the law that it was one of the main reasons why a chose in action or thing of which one hath the right but not the possession, was not assignable at common law, because, as it was said, no man should purchase any pretense to sue in another's right.[865] The common law as to champerty and maintenance is abolished in this state, and the only statutory provisions are the Code rule prohibiting the buying a bond, note, bill of exchange, book-debt, or other thing in action, with the intent and for the purpose of bringing an action thereon,[866] and the Code rule prohibiting the paying of a consideration to procure claims for the purpose of suing thereon.[867] Although the rule was formerly otherwise, an attorney may now contract with his client for a

862 3 Greenl. Ev. § 180.

863 4 Bl. Comm. 135.

864 Id.

865 Id.

866 Code Civ. Proc. § 73; Maxon v. Cain, 22 App. Div. 270, is an example of a purchase for the purpose of bringing suit.

867 Code Civ. Proc. § 74; Browne v. West, 9 App. Div. 135; Irwin v. Curie, 171 N. Y. 409.

portion of the recovery contingent on success[868] but an agreement between a wife and her attorney that the latter shall receive a share of the alimony is void as against public policy.[869] The decisions are conflicting as to whether an attorney can agree to pay all the costs and expenses of an action, but the later decisions seem to uphold such agreements where they have none of the elements of inducing litigation or holding out propositions for a retainer.[870]

§ 311. Prohibition against purchase of things in action for purpose of suit.

The Code provides that an attorney or counsellor shall not, directly or indirectly, buy, or be in any manner interested in buying, a bond, promissory note, bill of exchange, book-debt, or other thing in action, with the intent and for the purpose of bringing an action thereon.[871] It should be observed, however that the purpose to sue on the thing in action must be the sole reason for making the purchase, it not being sufficient that there is a secondary and contingent purpose to sue.[872] It is immaterial whether the transfer be taken in the name of the attorney or that of another person.[873] The provision applies to purchases at a judicial sale[874] but does not apply to a purchase

[868] Fitch v. Gardenier, 2 Keyes, 516; Fowler v. Callan, 102 N. Y. 395.

It is immaterial that the claim is not a matter of legal right but only one dependent on the bounty of the government. Grapel v. Hodges, 49 Hun, 107.

[869] Van Vleck v. Van Vleck, 21 App. Div. 272.

[870] Fowler v. Callan, 102 N. Y. 395; Browne v. West, 9 App. Div. 135; Fogerty v. Jordan, 25 Super. Ct. (2 Rob.) 319; Voorhees v. Dorr, 51 Barb. 580.

Cases where agreement has been held invalid, see Brotherson v. Consalus, 26 How. Pr. 213; Badger v. Celler, 41 App. Div. 599; Coughlin v. New York Cent. & H. R. R. Co., 71 N. Y. 443.

[871] Code Civ. Proc. § 73.

[872] Moses v. McDivitt, 88 N. Y. 62; West v. Kurtz, 19 State Rep. 803, 15 Civ. Proc. R. (Browne) 424; De Forest v. Andrews, 27 Misc. 145; Creteau v. Foote & Thorne Glass Co., 40 App. Div. 215.

[873] Browning v. Marvin, 100 N. Y. 144.

[874] Mann v. Fairchild, 14 Barb. 548.

of an interest in land,[875] or a purchase of chattels other than "things in action,"[876] or a purchase of stock in a corporation,[877] or a purchase of one demand for the purpose of securing another,[878] or a purchase for the honest purpose of protecting some other right of the purchaser,[879] or the purchase of a judgment for the purpose of issuing an execution thereon[880] or suing to have it declared a lien on lands of a third person,[881] or a purchase of plaintiff of the claim while suit is pending thereon,[882] or the inducing the purchase of a mortgage to sue thereon, as an investment,[883] or a purchase of a note with the intent to sue thereon before a justice of the peace,[884] or a purchase with intent to bring a "special proceeding" thereon, such as to call an administrator to account, with a view of obtaining payment of a valid claim,[885] or such as a purchase of a mortgage with intent to foreclose "by advertisement."[886]

§ 312. Prohibition against paying to procure claims to sue on.

The Code provides that an attorney shall not, either before or after action brought, promise or give, or procure to be promised or given, a valuable consideration to any person, as an inducement to placing, or in consideration of having placed, in his hands or in the hands of another person, a demand of any kind for the purpose of bringing an action, but such prohibition does not apply to an agreement between attorneys and counselors, or either, to divide between themselves the com-

875 Townshend v. Fromer, 15 Civ. Proc. R. (Browne) 8, 16 State Rep. 892.
876 Van Dewater v. Gear, 21 App. Div. 201.
877 Ramsey v. Erie Ry. Co., 57 Barb. 450.
878 Van Rensselaer v. Sheriff of Onondaga County, 1 Cow. 443.
879 Baldwin v. Latson, 2 Barb. Ch. 306.
880 Warner v. Paine, 3 Barb. Ch. 630; Brotherson v. Consalus, 26 How. Pr. 213.
881 Fay v. Hebbard, 42 Hun, 490.
882 Wetmore v. Hegeman, 88 N. Y. 69.
883 Stephens v. Humphreys, 39 State Rep. 134.
884 Goodell v. People, 5 Park. Cr. R. 206.
885 Tilden v. Aitkin, 37 App. Div. 28.
886 Hall v. Bartlett, 9 Barb. 297.

pensation to be received.[887] No cause of action can arise out of a transaction thus prohibited.[888]

§ 313. Manner of raising objection, and judgment.

The rule seems to be that it is no defense to an action, that the subject-matter was purchased by an attorney for prosecution in violation of the statute.[889] The objection raises a question of law to be disposed of by the court,[890] though the intent of the attorney making a purchase is a proper subject for inquiry and determination by a jury, since that subject ought to be submitted to the jury for a special finding of fact, and on the coming in of their verdict, the court can then determine whether the plaintiff should have a recovery or the complaint be dismissed.[891] It seems that the objection merely goes to the capacity of plaintiff to sue, and hence that a judgment on the merits should not be rendered but that the judgment should either dismiss the complaint or be a judgment of nonsuit.[892] The court of appeals has held, however, that when the defense is made out, and the question of intent is for the court, an absolute judgment in favor of defendant, as distinguished from a nonsuit, is proper.[893]

4. Authority.

§ 314. Presumption of authority.

The authority of an attorney to appear is presumed,[894] and an attorney admitting service of a notice after judgment, is

[887] Code Civ. Proc. § 74; Hirshbach v. Ketchum, 5 App. Div. 324; Hess v. Allen, 24 Misc. 393; Stedwell v. Hartmann, 74 App. Div. 126. In Matter of Fitzsimons, 174 N. Y. 15, an agreement by which an attorney, out of his half, agrees to pay counsel fees, is held not champertous.

[888] Oishei v. Lazzarone, 40 State Rep. 660.

[889] Orcutt v. Pettit, 4 Denio, 233; Story v. Satterlee, 13 Daly, 169; Hall v. Gird, 7 Hill, 586.

[890-892] Gilroy v. Badger, 27 Misc. 640.

[893] Mann v. Fairchild, 3 Abb. App. Dec. 152, 161.

[894] Bank Com'rs v. Bank of Buffalo, 6 Paige, 497; Burghart v. Gardner, 3 Barb. 64; Bank of Middletown v. Huntington, 13 Abb. Pr. 402; Cassidy v. Leitch, 2 Abb. N. C. 315; People ex rel. Allen v. Murray, 2 Misc. 152, 50 State Rep. 535, 23 Civ. Proc. R. (Browne) 71; People v. Lamb, 85 Hun, 171.

presumed to have authority to do so.[895] If the party for whom the attorney appears denies his authority before the adverse party has acquired any rights, the court may correct the proceeding, but if such rights have been acquired, the remedy of the party is against the attorney.[896]

§ 315. Compelling disclosure of authority.

As a general rule, when the right of an attorney to use the name of a plaintiff is questioned by the opposite party, if the attorney be a reputable member of the bar, the court will not, unless the action be one for the recovery of land, require proof of the authority to be produced, but the right of the court to require its production in all cases is undoubted, and it will be exercised when, in its judgment, the ends of justice demand it.[897] Where there is doubt as to the authority of an attorney to appear, the court will compel production of proofs, as where an attorney sues for a large number of plaintiffs.[898] The right to appear for a convict must be proved, as in case of authority to appear for a nonresident,[899] but the authority of an attorney duly appointed to appear for the city of New York will be recognized, notwithstanding the charter designates certain persons to take charge of all the city's law business.[900]

——**In ejectment.** The statutory requirement of the production of authority to appear for plaintiff in ejectment, on motion of defendant,[901] is complied with by exhibiting the verification of the complaint by plaintiff.[902] If the proof of author-

[895] Wing v. De La Rionda, 125 N. Y. 678, 34 State Rep. 267.

[896] American Ins. Co. v. Oakley, 9 Paige, 496.

[897] Stewart v. Stewart, 56 How. Pr. 256; Jackson v. Stewart, 6 Johns. 34.

[898] Ninety-nine Plaintiffs v. Vanderbilt, 1 Abb. Pr. 193, 11 Super Ct. (4 Duer) 632; Hollins v. St. Louis & C. Ry. Co., 25 Abb. N. C. 93, 57 Hun, 139, 32 State Rep. 230.

[899] Matter of Stephani's Estate, 75 Hun, 188, 58 State Rep. 185.

[900] City of New York v. Hamilton Fire Ins. Co., 23 Super. Ct. (10 Bosw.) 537; City of New York v. Exchange Fire Ins. Co., 3 Keyes, 436, 34 How. Pr. 103.

[901] Code Civ. Proc. §§ 1512, 1513; Stewart v. Hilton, 27 Misc. 239; Hays v. Union Trust Co., 27 Misc. 240.

[902] Graham v. Andrews, 11 Misc. 649, 66 State Rep. 177, 24 Civ. Proc. R. (Scott) 263.

ity is not sufficient, the remedy is by appeal and not by motion to dismiss the complaint.[903] However, it has been held that a defendant in ejectment may insist upon the judgment in his own favor, notwithstanding that he has not called for the exhibition of the authority of plaintiff's attorney, in the absence of suspicious circumstances requiring him to do so. The court stated that "it would be at variance with the scheme and plan upon which we universally administer the law, if a defendant could be prosecuted by a responsible attorney, in full authority to practice in our courts, and after having successfully and in good faith defended, as the case might be, through all the tribunals of justice, and to final judgment in the court of last resort, be required to submit to an order setting aside the proceedings, and be left to be again prosecuted for the same cause of action, on the mere ground that the plaintiff's attorney had no authority from the plaintiff to bring the action."[904]

—— **Matters considered on motion.** The question whether a corporation has forfeited its charter, or whether the president has authority to cause the action to be brought, will not be inquired into upon a motion to compel the corporation's attorney to produce his authority.[905]

—— **Sufficiency of order.** An order to produce authority should be specific and designate place and officer before whom to be produced, and is insufficient where it does not designate the place for its production.[906]

—— **Compliance with order.** A description of one of the plaintiffs as residing in the city of New York is not sufficient, where defendants have been unable to find him therein and the other plaintiffs are nonresidents.[907]

§ 315a. Exclusive authority of attorney.

Where a party has appeared by attorney, the adverse party should deal with the attorney,[908] and a judgment entered upon

903 Carpenter v. Allen, 45 Super. Ct. (13 J. & S.) 322.
904 Hamilton v. Wright, 37 N. Y. 502.
905 Havana City Ry. Co. v. Ceballos, 25 Misc. 660.
906 Turner v. Davis, 2 Denio, 187, 2 How. Pr. 86.
907 Havana City Ry. Co. v. Ceballos, 25 Misc. 660.
908 Chadwick v. Snediker, 26 How. Pr. 60.

the offer of defendant personally without notice to the attorney is irregular,[909] but an agreement signed by a party is binding against him, though his attorney had no notice of it.[910] The client has no right to control the attorney in the due and orderly conduct of the suit.[911] The attorney has plenary power in conducting a suit, and can bind his client, in spite of contrary instructions from him. His power in this respect, however, is limited to those acts which conduce, or tend to conduce, to the success of his client. Against the instructions of the client, the attorney cannot withdraw an answer containing a confession of judgment,[912] and a motion to open a default against the instructions of his client will be denied.[913]

§ 316. Implied powers of an attorney.

An attorney in an action has implied authority by virtue of his retainer to do whatever in his judgment may be necessary to advance his client's interest, either in the prosecution or defense of the action. The attorney may bind his client by admissions made during the proceedings,[914] but counsel employed to argue a demurrer has no implied authority to stipulate that the decision on the demurrer shall be final.[915] Counsel who have charge of a trial, may amend the pleadings at the trial without the knowledge of the attorney of record,[916] but where a party has an attorney of record, he cannot without his concurrence, make a motion by counsel.[917] An attorney has no power to bind his client by directing or ratifying a trespass.[918] An attorney has no authority, without the knowledge and consent of his client, to consent to vacate a judgment which is

909 Webb v. Dill, 18 Abb. Pr. 264.

910 Braisted v. Johnson, 7 Super. Ct. (5 Sandf.) 671.

911 Anonymous, 1 Wend. 108; Pilger v. Gou, 21 How. Pr. 155; McBratney v. Rome, W. & O. R. Co., 87 N. Y. 467.

912 Herbert v. Lawrence, 42 State Rep. 406.

913 Derickson v. McCardle, 2 How. Pr. 196. Contra,—Anonymous, 1 Wend. 108.

914 Oliver v. Bennett, 65 N. Y. 559; Converse v. Sickles, 17 Misc. 169.

915 Baron v. Cohen, 62 How. Pr. 367.

916 Devlin v. City of New York, 15 Abb. Pr., N. S., 31.

917 Kiernan v. Campbell, 1 Month. Law Bul. 18.

918 Clark v. Woodruff, 83 N. Y. 518.

pending and secured on appeal, since such an act is outside of his ordinary duties as an attorney.[919]

—— **Stipulations.** An attorney has authority to enter into a stipulation in a pending proceeding relating to the subject matter of the litigation,[920] but the stipulation, if such as to affect the substantial rights of the client, should be with his express assent or authority;[921] and where the stipulation is thoughtlessly and improvidently entered into by the attorney, to the prejudice of his client, the latter will be relieved therefrom.[922] An attorney may stipulate after judgment for an extension of the time for the other side to perfect an appeal,[923] but he cannot stipulate not to appeal or to seek a new trial.[924]

—— **Power to compromise or release.** An attorney has no implied authority to settle his client's suit by compromise,[925] or to satisfy a judgment recovered for the client, except on actual payment in money of the full amount.[926] He cannot release the cause of action[927] or release one defendant from liability under the judgment recovered for his client,[928] but it has been held that where a party is on the limits under arrest on a judgment for costs only, the attorney for the judgment creditor can give a valid order for his discharge.[929] He cannot make an offer of judgment against his client.[930]

[919] Quinn v. Lloyd, 5 Abb. Pr., N. S., 281, 30 Super. Ct. (7 Rob.) 538, 36 How. Pr. 378.

[920] Stipulations may be made as to depositions. Ludeman v. Third Ave. R. Co., 72 App. Div. 26.

[921] McKechnie v. McKechnie, 3 App. Div. 91.

[922] First Soc. of M. E. Church v. Rathbun, 5 Wkly. Dig. 53.

[923] Hoffenberth v. Muller, 12 Abb. Pr., N. S., 221. Contra,—Bergholtz v. Ithaca St. Ry. Co., 27 Misc. 176 (justice of the peace case).

[924] People v. City of New York, 11 Abb. Pr. 66.

[925] Barrett v. Third Ave. R. Co., 45 N. Y. 628; Smith v. Bradhurst, 18 Misc. 546; Lytle v. Crawford, 69 App. Div. 273.

[926] Beers v. Hendrickson, 45 N. Y. 665; Tito v. Seabury, 18 Misc. 283.

[927] Barrett v. Third Ave. R. Co., 45 N. Y. 628.

[928] Carstens v. Barnstorf, 11 Abb. Pr., N. S., 442.

[929] Davis v. Bowe, 3 State Rep. 531.

[930] Bush v. O'Brien, 164 N. Y. 205.

—— **Submission to arbitration.** It is not within the ordinary powers of an attorney to submit the cause to arbitration.[931]

—— **Consent to reference.** An attorney has implied authority to consent to the reference of an action.[932]

—— **Discontinuance of action.** An attorney has power to discontinue an action, without the consent of his client.[933]

—— **Employment of third persons.** An attorney has no implied authority to employ counsel for his clients,[934] but may employ expert witnesses to testify in the case,[935] or employ an expert in view of the probable need of his testimony in anticipated litigation.[936] An attorney may bind the client for the fees of a stenographer employed to take the minutes of proceedings on a reference,[937] or the wages of a person, having knowledge of the facts, to prepare a statement necessary to be used in the proceedings,[938] and it is immaterial that the person employed did not know when he began his work who the client was, or that the work was for him.[939]

—— **Directing levy of writ or ordering arrest.** An attorney has implied power to direct an officer as to the time and manner of levying an execution or attachment, but has no authority to direct the sheriff as to what property shall be levied upon.[940] He has implied authority to issue an execution against the person of a defendant,[941] and when a judgment is paid to the attorney, if the judgment debtor is in custody, either actual or constructive, under an execution issued against his

931 Stinerville & Bloomington Stone Co. v. White, 25 Misc. 314.

932 Tiffany v. Lord, 40 How. Pr. 481; Ives v. Ives, 80 Hun, 136.

933 Barrett v. Third Ave. R. Co., 45 N. Y. 628.

934 Dwight v. Dada, 12 Wkly. Dig. 302; Cook v. Ritter, 4 E. D. Smith, 253; Meaney v. Rosenberg, 32 Misc. 96.

935 Mulligan v. Cannon, 25 Civ. Proc. R. (Scott) 348; Packard v. Stephani, 85 Hun, 197.

936 Brown v. Travellers' Life & Accident Ins. Co., 21 App. Div. 42.

937 Harry v. Hilton, 11 Abb. N. C. 448.

938 Foland v. Dayton, 20 Wkly. Dig. 59.

939 Covell v. Hart, 14 Hun, 252.

940 Gorham v. Gale, 7 Cow. 739; Averill v. Williams, 4 Denio, 295; Guilfoyle v. Seeman, 41 App. Div. 516; Fischer v. Hetherington, 11 Misc. 575.

941 Guilleaume v. Rowe, 94 N. Y. 268.

person upon such judgment, it is within the power of the attorney to authorize the sheriff to discharge him.[942]

—— **Authority to receive payment.** An attorney generally has authority to receive payment, but his authority is usually limited to the receipt of money.[943] He may receive payment of a judgment within two years from its rendition, but not afterwards.

§ 317. Who may raise objection of want of authority.

The objection of want of authority to appear cannot be ordinarily raised by the adverse party.[944]

§ 318. Effect of appearance without authority.

In the leading case of Denton v. Noyes,[945] an attorney appeared and confessed judgment against the defendant without authority. The court (Chief Justice Kent presiding) opened the default, but allowed the judgment to stand as security. One judge dissented, on the ground that the judgment should be set aside in toto. This case decided, first, that an attorney has no power to confess judgment without authority, although the judgment so confessed is not irregular; and, second, that such a judgment will be opened upon a proper application, without any regard to the client's remedy against his attorney. This doctrine was affirmed by the court of appeals in a recent case where it was said that "it has become the settled practice that relief against a judgment rendered against a party upon the unauthorized appearance of an attorney in his name, is to be sought in a direct application to the court by motion in the action in which the unauthorized appearance was entered," except that where the question of the unauthorized appearance is complicated with fraud, or the rights of purchasers, or the circumstances are such that the court can see that the right to

942 Davis v. Bowe, 118 N. Y. 55.

943 Lewis v. Woodruff, 15 How. Pr. 539; Sheridan v. Farnham, 21 Wkly. Dig. 470; Mills v. Stewart, 88 Hun, 503; Diamond Soda Water Mfg. Co. v. J. N. Hegeman & Co., 74 App. Div. 430.

944 Diedrick v. Richley, 2 Hill, 271; Guliano v. Whitenack, 9 Misc. 562.

945 Denton v. Noyes, 6 Johns. 296.

or measure of relief cannot properly be determined on motion, resort may be had to an equitable action.[946] Where a suit was prosecuted without authority by an insolvent attorney who recovered judgment and issued execution, it was held that the execution should be set aside and proceedings stayed.[947] It is well settled that the authority of an attorney to bring an action cannot be collaterally questioned by the client in another action.[948] The court will refuse to proceed at the instance of an attorney acting without authority from a party whom he claims to represent.[949]

5. Substitution of Attorneys.

(a) *Right, Necessity, and Grounds.*

§ 319. In general.

The rules of practice provide that an attorney may be changed by consent of the party and his attorney, or upon application of the client upon cause shown and upon such terms as shall be just, by the order of the court or a judge thereof, and not otherwise.[950] The right of a party to change his attorney at pleasure, is never disallowed, unless it appears, that the change would deprive the attorney previously appointed of his rights, or would in some manner, unduly embarrass the course of justice in the cause.[951] Consent of the removed attorney alone, without the consent of the party, is insufficient, nor is it sufficient to file such consent except in connection with an order of substitution entered and notice of the order served on the adverse party.[952] Such consent, however, precludes the retiring attorney from subsequently acting in the case.[953] Substitution may be sought for cause or without assigning any

946 Vilas v. Plattsburgh & M. R. Co., 123 N. Y. 440.
947 Campbell v. Bristol, 19 Wend. 101.
948 Donohue v. Hungerford, 1 App. Div. 528, 73 State Rep. 78.
949 Hudson River West Shore R. Co. v. Kay, 14 Abb. Pr., N. S., 191; Lindheim v. Manhattan Ry. Co., 68 Hun, 122.
950 Rule 10 of General Rules of Practice.
951 Mumford v. Murray, Hopk. Ch. 369.
952 Buckley v. Buckley, 45 State Rep. 827; Krekeler v. Thaule, 49 How. Pr. 138.
953 Quinn v. Lloyd, 36 How. Pr. 378; Felt v. Nichols, 21 Misc. 404.

cause. The only difference is that in the one the substitution may be unconditional while in the other the substitution is granted as a matter of course, but just terms are imposed.[954] Apart from the question of misconduct or bad faith, a client, subject only to the payment of the attorney's fees in a proper case, or securing them if they cannot then be fixed and determined, has the right, without assigning cause, at any point in a suit or proceeding, to change his or her attorney.[955]

§ 320. Removal on court's own motion.

Where attorneys, in their presentation of a case, seek to impose upon the court, or use its powers to accomplish their purposes by wicked or corrupt practices, the court may, on its own motion, remove them from charge of the action.[956]

§ 321. Discharge for cause.

A refusal to proceed on the ground that the attorney's fees are not paid and a refusal to permit another attorney to conduct the litigation, are ground for ordering a substitution of attorneys. The attorney, in order to preserve his lien, must show performance or such a condition as clearly justifies his withdrawal. On granting the order of substitution, it should be determined whether the fees of the retiring attorney should be paid or secured or whether the substitution be unconditional, the terms being within the discretion of the court,[957] but the order of substitution should not require the attorney to give up papers in other actions on which he has a lien, without providing for the settlement of all matters between him and his client.[958] Removal of the attorney from the state, was formerly

[954] Matter of Prospect Ave., 85 Hun, 257.

[955] Matter of Prospect Ave., 85 Hun, 257; Ogden v. Devlin, 45 Super. Ct. (13 J. & S.) 631; Prentiss v. Livingston, 60 How. Pr. 380.

[956] Stewart v. Stewart, 56 How. Pr. 256.

[957] Halbert v. Gibbs, 16 App. Div. 126; Matter of H———. 93 N. Y. 381; Tuck v. Manning, 53 Hun, 455, 17 Civ. Proc. R. (Browne) 175; Barkley v. New York Cent. & H. R. R. Co., 35 App. Div. 167; Fargo v. Paul, 35 Misc. 568.

[958] City of Philadelphia v. Postal Telegraph Cable Co., 1 App. Div. 387, 72 State Rep. 617.

held a ground for substitution,[959] but it is questionable whether such rule would now prevail if the attorney retains an office in this state, since a nonresident is allowed, in such case, to practice here. Obtaining a loan of a large sum from a widowed client, without security, necessitating a resort to legal remedies to collect it, authorizes an unconditional order of substitution.[960]

§ 322. Grounds for refusing.

It is improper to order substitution at the instance of one who becomes owner of the subject-matter of the suit, where the compensation for the prosecution thereof was to be contingent upon success,[961] or where it will result in the discontinuance of the action, and cause the claims sued for by plaintiff for other persons to be barred.[962] The fact that a lien is claimed under an agreement of doubtful validity, will not preclude a substitution.[963]

§ 323. Necessity.

Substitution is not required where one of the law firm appearing for defendants, was appointed clerk of the court, where he did not afterwards take any part in the action.[964] The successor of the attorney general need not be substituted in an action brought by his predecessor in behalf of the people.[965]

(b) Manner of Substitution.

§ 324. Order of court and notice.

When an attorney has been duly appointed and has acted in the suit, he cannot be displaced by the appointment of another, without an order of the court. This restriction is necessary to preserve regularity in the conduct of suits, and to prevent the confusion and abuses which might ensue if a party were

959 Chautauqua County Bank v. Risley, 6 Hill, 375.
960 Matter of Prospect Ave., 85 Hun, 257, 66 State Rep. 497.
961 Steenburgh v. Miller, 11 App. Div. 286.
962 Hirshfeld v. Bopp, 5 App. Div. 202.
963 De Witt v. Stender, 52 Hun, 615, 5 N. Y. Supp. 602.
964 Cronin v. O'Reiley, 26 State Rep. 249.
965 People ex rel. Lardner v. Carson, 78 Hun, 544, 61 State Rep. 161

at liberty to change his attorney, without any control from the court. Without this restriction, an attorney might be deprived of his lien for costs, the proceedings might be delayed or entangled by repeated changes of attorneys, and the court could never know when a cause is legitimately before it by the true representatives of the parties.[966] The order is usually obtained without notice, on a written consent of the withdrawing attorneys. It follows that service of a notice upon a substituted attorney is irregular where no order of substitution has been entered.[967] Until an order is entered and notice given, the adverse party is justified in treating only with the attorney who first appeared in the action, and, it seems, the original attorney may then bind his client by stipulations.[968] The new attorney will not be allowed, before substitution, to move for a stay.[969] Municipal corporations having a law department and counsel appointed for a given period of time are no exception to the rule which applies to all suitors, artificial as well as natural persons.[970]

—— **After judgment.** After judgment, a party may retain another attorney without an order of substitution,[971] and retention of another attorney to issue execution, after entry of judgment, is a complete substitution, since the entry of judgment terminates the functions of the attorney.[972] However, this rule does not seem settled as it is held that an appeal can not be taken by a new attorney who has not been regularly substituted,[973] except that an appeal may be taken to the court of ap-

[966] Miller v. Shall, 67 Barb. 446; Felt v. Nichols, 21 Misc. 404.

A party cannot be compelled to accept substitution and to pay the amount due the removed attorney, by contempt proceedings. Gardner v. Tyler, 5 Abb. Pr., N. S., 33.

[967] Wood v. Holmes, 19 Wkly. Dig. 121.

[968] Heath v. Taylor, 2 How. Pr. 121.

[969] Board Sup'rs of Ulster County v. Brodhead, 44 How. Pr. 426.

[970] Parker v. City of Williamsburgh, 13 How. Pr. 250; Board Sup'rs of Ulster County v. Brodhead, 44 How. Pr. 411.

[971] Davis v. Solomon, 25 Misc. 695.

[972] Ward v. Sands, 10 Abb. N. C. 60; Thorp v. Fowler, 5 Cow. 446.

[973] Shuler v. Maxwell, 38 Hun, 240; Pensa v. Pensa, 3 Misc. 417; 52 State Rep. 447.

Contra,—Webb v. Milne, 10 Civ. Proc. R. (Browne) 27.

peals without a substitution by order of court, under rule 3 of the rules of the court of appeals.[974]

Form of consent and order of substitution.

At a Special Term ——— of the ——— held at ——— in the ——— on the —— day of ——— A. D. ——. Present—Hon. ———.

[Title of case.]

On reading and filing the annexed consent of ———. and on motion of ———,

Ordered, That ——— of ——— be and hereby is substituted in place of ——— as attorney for the ——— in the above-entitled action.

[Title of case.]

We hereby consent that ——— of ——— be substituted in the place and stead of the undersigned ——— as attorney for the ——— in the above entitled action, and that an order to that effect may be entered without further notice. [Signature.]

[Date.]

State of New York, City of ———, County of ———, ss:

On this —— day of ———, in the year ——, before me personally came the above named ———, to me known, and known to me to be the same person who executed the foregoing consent and acknowledged to me that he executed the same. [Signature.]

§ 325. Court in which to move.

The motion for substitution, after appeal and the return has been filed in the court of appeals, should be made in the court of appeals, but in the absence of an objection to the authority of the court below to order substitution, after an appeal taken, the appellate court will act on a motion to dismiss the appeal.[975]

§ 326. Notice.

Substitution is not effectual without notice served on the adverse party,[976] but service of notice of the substitution instead of the order is sufficient.[977]

[974] Magnolia Metal Co. v. Sterlingworth Ry. Supply Co., 37 App. Div. 366.

[975] Squire v. McDonald, 138 N. Y. 554.

[976] Felt v. Nichols, 21 Misc. 404.

[977] Dorlon v. Lewis, 7 How. Pr. 132; Bogardus v. Richtmeyer, 3 Abb. Pr. 179.

(c) Terms on Granting Order.

§ 327. Nature of proceeding.

The supreme court has jurisdiction to determine upon what terms attorneys shall be changed, either upon motion or in a summary proceeding, but it is the better practice to not entitle the proceeding in the action but to treat it as a summary special proceeding.[978] On a motion for substitution, a determination that the attorneys have lost their lien because of misconduct is conclusive on them and their privies, though they are not thereby precluded from recovering the value of the services.[979] The remedy of an attorney whose client has died pending an appeal which another attorney was retained to prosecute, is not by an amendment of the judgment making the costs payable to him, but by a hearing in the proceeding.[980]

——**Reference to determine attorney's compensation.** On application for substitution, the usual practice is for the court to order a reference and summarily fix the retiring attorney's compensation.[981] A motion to confirm a report of the referee may be made before the justice who ordered the reference, though he is then sitting at the trial term, and the motion to confirm was noticed therefor.[982] Upon confirmation of the referee's report and payment of the amount found due and incidental expenses, the new attorney should be substituted.[983]

§ 328. Just terms.

The terms imposed on granting the application, where no cause for removal is shown, are to be "such terms as shall be just,"[984] which will depend largely on whether the substitu-

978 Doyle v. City of New York, 26 Misc. 61.

979 Barkley v. New York Cent. & H. R. R. Co., 42 App. Div. 597.

980 People ex rel. Reynolds v. Common Council of Buffalo, 9 Misc. 403, 61 State Rep. 692.

981 Griggs v. Brooks, 79 Hun, 394; City of Philadelphia v. Postal Telegraph Cable Co., 1 App. Div. 387; Matter of Department of Public Works, 58 App. Div. 459; Yuengling v. Betz, 58 App. Div. 8.

982 Hinman v. Devlin, 40 App. Div. 234.

983 Ogden v. Devlin, 45 Super. Ct. (13 J. & S.) 631.

984 Rule 10 of General Rules of Practice; Wolf v. Trochelman, 28 Super. Ct. (5 Rob.) 611; Hazlett v. Gill, 28 Super. Ct. (5 Rob.) 611;

tion is because of any misconduct of the attorney. On ordering a substitution asked on grounds involving no fault on the part of the attorney, payment, or an assignment of an interest in the suit sufficient to cover the compensation and disbursements, is properly required.[985] The sum admitted to be due the attorney may be made a first lien on the judgment.[986] Or the order may provide that the lien of the attorney as fixed by the contract shall not be impaired by the substitution.[987] But the lien should be limited to the attorney's costs and fees,[988] and be confined to the papers in the attorney's hands.[989] If the client is a nonresident, security for costs may be required to be given to the retiring attorney.[990] On substitution of attorneys, after the insolvency of the client, it is especially important that the rights of the retiring attorneys be protected.[991]

—— **Securing claim for services in other action or court.** A substitution should be allowed on payment of the fee for an appearance in an action, without regard to the value of previous services in other actions, where the only service rendered in the action was the entering of an appearance.[992] No security was required to be given, in the common pleas, for services rendered in another court.[993]

—— **Right of attorney to retain papers.** On the client offer-

Krekeler v. Thaule, 49 How. Pr. 138; Board Sup'rs of Ulster County v. Brodhead, 44 How. Pr. 411; Hoffman v. Van Nostrand, 14 Abb. Pr. 336.

If one member of firm is substituted for firm, after dissolution thereof, the terms may be that the order be without prejudice to any lien of the firm attaching at the date of the substitution. Schneible v. Travelers' Ins. Co., 36 Misc. 522.

985 Howland v. Taylor, 6 Hun, 237; Yuengling v. Betz, 58 App. Div. 8.

986 Matter of Cowman, N. Y. Daily Reg., Feb. 20, 1883.

987 Jeffards v. Brooklyn Heights R. Co., 49 App. Div. 45; Stewart v Steck, 6 State Rep. 524.

988 Trust v. Repoor, 15 How. Pr. 570.

989 Hinman v. Devlin, 40 App. Div. 234.

990 Esty v. Trowbridge, 1 Month. Law Bul. 55.

991 Clark v. Binninger, 1 Abb. N. C. 421.

992 People's Bank v. Thompson, 63 State Rep. 165, 24 Civ. Proc. R. (Scott) 62.

993 Matter of Davis, 7 Daly, 1.

ing to give security for the amount shown to be due, papers retained by the attorney should be ordered to be given up.[994]

—— **Where substitution is for cause.** Unconditional substitution will be ordered where the attorney has been guilty of misconduct,[995] and where services rendered by the attorney have been valueless because of his incompetency, substitution should be made without requiring payment of fees.[996]

§ 329. Enforcement of terms.

The court may order judgment for the payment of amount due, and direct an execution to be issued therefor.[997] Where the retiring attorney's compensation is ordered to be paid on collection of the judgment, disobedience to the order is a contempt.[998]

§ 330. Waiver of objections.

While an attorney may not be bound to accept the terms of an order on substitution, yet having done so he cannot thereafter question it.[999]

§ 331. Effect of giving bond for payment.

No action will lie, by the representatives of a client, after his death, to compel the determination of the attorney's claim, where a bond was given on substitution conditioned to pay any sum which the attorney might recover for his services.[1000]

(d) Proceedings Where Attorney Becomes Unable to Act.

§ 332. Death, removal or suspension of attorney.

The Code provides that if an attorney dies, is removed or

994 Cunningham v. Widing, 5 Abb. Pr. 413.

995 Pierce v. Waters, 10 Wkly. Dig. 432; Matter of Prospect Ave., 85 Hun, 257, 66 State Rep. 497; Williamson v. Carlton, 91 Hun, 637, 36 N. Y. Supp. 1135; Barkley v. New York Cent. & H. R. R. Co., 35 App. Div. 167.

996 Reynolds v. Kaplan, 3 App. Div. 420, 74 State Rep. 99.

997 Greenfield v. City of New York, 28 Hun, 320.

998 Hammond v. Dean, 6 Thomp. & C. 337, 4 Hun, 131.

999 Griggs v. Brooks, 79 Hun, 394.

1000 Thompson v. Hawke, 54 Hun, 388.

suspended, or otherwise becomes disabled to act, at any time before judgment in an action, no further proceeding shall be taken in the action, against the party for whom he appeared, until thirty days after notice to appoint another attorney, has been given to that party, either personally, or in such other manner as the court directs.[1001] Thus the taking of an inquest within the thirty days after notice to appoint another attorney, is irregular,[1002] and notice of argument of appeal cannot be given during the thirty days.[1003] This provision does not apply where the attorney dies after judgment,[1004] but on disbarment after verdict in a foreclosure suit, notice to appoint another attorney must be given, before the decree is entered or executed, as the Code provision applies to proceedings not requiring notice.[1005]

§ 333. Notice.

The notice to appoint another attorney must be given to the party personally, or in such other manner as the court directs.[1006] A constructive notice is not sufficient, but copies of papers to stay proceedings on the ground that plaintiff's attorney had been convicted of felony, and of proof presented at general term, are sufficient, although no copy of the charges are served on the attorney.[1007] If there is more than one party for whom the attorney acted, all of them must be served with notice.[1008]

—— **Effect of failure to comply with notice.** If another attorney is not appointed after request, notice may be thereafter given to the party personally.[1009]

1001 Code Civ. Proc. § 65; Agricultural Ins. Co. v. Darrow, 70 App. Div. 413.

1002 Forbes v. Muxlow, 18 Civ. Proc. R. (Browne) 239.

1003 Hickox v. Weaver, 15 Hun, 375.

1004 Hall v. Putnam, 23 Wkly. Dig. 513; Chilson v. Howe, 17 Civ. Proc. R. (Browne) 86.

1005 Commercial Bank v. Foltz, 13 App. Div. 603.

1006 Hildreth v. Harvey, 3 Johns. Cas. 300.

1007 In re Powers, 13 Wkly. Dig. 476.

1008 Hickox v. Weaver, 15 Hun, 375.

1009 Hoffman v. Rowley, 13 Abb. Pr. 399.

—— **Effect of want of notice.** Proceedings in an action after the death of an attorney, without notice to appoint another, will be set aside on motion.[1010]

(*e*) *Effect of Substitution.*

§ 334. Rights of new attorney.

A substituted attorney may be allowed to inspect and copy the pleadings, where the party is unable to discover the whereabouts of his former attorney,[1011] but where the new attorney is prohibited from acting until an appeal from the order of substitution has been heard, an appeal taken by him should be dismissed.[1012] A motion by the attorney substituted after appeal, to compel the delivery of papers to him, should be made in the lower court.[1013]

§ 335. Rights of old attorney.

After substitution after judgment, the retiring attorney has no authority to satisfy the judgment.[1014] An attorney refusing to continue an appeal, has no right to costs subsequently accruing on the appeal after the cause has been conducted by another attorney, although there was no order of substitution.[1015]

6. Summary Remedies of Client.

§ 336. Nature and form of remedy.

The remedy for an act of an attorney or counsel inconsistent with his relation to the court, is by a summary proceeding and not by a formal action.[1016] The principle upon which this exceptional remedy in such cases is based is the power which the court has over its own officers to prevent them from, or pun-

[1010] Lyman v. Dillon, N. Y. Daily Reg., Oct. 10, 1881.

[1011] Butterfield v. Bennett, 30 State Rep. 302, 56 Hun, 640, 8 N. Y. Supp. 910.

[1012] Sheldon v. Mott, 84 Hun, 608, 32 N. Y. Supp. 667.

[1013] People ex rel. Hoffman v. Board of Education, 141 N. Y. 86.

[1014] Mitchell v. Piqua Club Ass'n, 15 Misc. 366.

[1015] Matter of Hahn, 16 Wkly. Dig. 357.

[1016] Foster v. Townshend, 68 N. Y. 203; Grangier v. Hughes, 56 Super. Ct. (24 J. & S.) 346; Matter of Mertian, 29 Hun, 459.

ish them for, committing acts of dishonesty or impropriety calculated to bring contempt upon the administration of justice. In such cases the court, in vindication of its own dignity or for the relief of the client when clearly wronged, may entertain summary proceedings by attachment against any of its officers, and may, in its discretion, direct the payment of money or punish them by fine or imprisonment. When an application is made to the court for the exercise of its powers to compel an attorney to pay over money received for and belonging to the client, the ground of the jurisdiction is the misconduct of its own officer. It has been said that this power should always be exercised with great prudence and caution and a sedulous regard for the rights of the client on the one hand and of the attorney on the other. It is not an absolute right that the client has to invoke this severe and summary remedy against the attorney, but one always subject to discretion. It is for the court to say when and under what circumstances it will entertain such proceedings against its officers, upon the application of the client, and a refusal to proceed in that way is not the denial of any legal right.[1017] The purpose of the proceeding is usually to compel the attorney to pay over moneys in his hands, collected in the course of his employment. The proceeding has been maintained to recover surplus moneys arising from a foreclosure, where the attorney failed to pay them over.[1018] Neglect of attorney to take an appeal within the statutory time, whereby the right to appeal was lost, is not ground for summary action to enforce a stipulation given to defer an action against the attorney for such neglect, but the client will be remitted to his action at law.[1019]

§ 337. Grounds for refusing.

The pendency of an action by the client for the same cause, is ground for refusing to grant a summary order,[1020] though

1017 Schell v. City of New York, 128 N. Y. 67; Keeney v. Tredwell, 71 App. Div. 521.

1018 Matter of Silvernail, 45 Hun, 575.

1019 Berks v. Hotchkiss, 82 Hun, 27.

1020 Matter of Mott, 36 Hun, 569. See, also, Cottrell v. Finlayson, 4 How. Pr. 242.

the fact that the client has recovered a money judgment against his attorney, has been held, in a recent case, not a waiver of his right to a summary application.[1021] The power of the court is not affected by the fact that the action wherein the moneys were collected, was brought in another state, while the attorney was employed here.[1022] The assertion of a lien on the fund or securities, though in good faith, is not a ground for refusing the summary remedy.[1023] The summary proceeding should not be entertained, however, where an action would be barred by the statute of limitations;[1024] but a summary proceeding will not be dismissed because the dispute should be settled by action, where the objection was not made until after an action was barred by the statute of limitations.[1025] So the client should be left to an action where he has accepted notes for repayment of the money due the client.[1026]

§ 338. Necessity of professional employment.

The practice of the courts has not extended so far as to justify a summary proceeding against an attorney, simply because he has been guilty of fraudulent misconduct in his dealings with third persons. It extends, on the contrary, no further than to restrain and punish the attorney for misconduct in exercising the functions of his office, or when it is connected with some professional employment. Whenever he may be employed professionally, or moneys, in that capacity, may pass into his possession, and he conducts himself dishonestly or unprofessionally, he may be punished by means of this summary pro-

1021 Gabriel v. Schillinger Fire Proof Cement & Asphalt Co., 24 Misc 313.

1022 Batterson v. Osborne, 63 Hun, 633, 18 N. Y. Supp. 431, 44 State Rep. 839.

See Matter of Forster, 49 Hun, 114, where remedy was refused as against attorney whose services were rendered as attorney of a court of the United States.

1023 Bowling Green Sav. Bank v. Todd, 52 N. Y. 489; Matter of Chittenden, 4 State Rep. 606; Gillespie v. Mulholland, 12 Misc. 40, 66 State Rep. 532.

1024 Van Tassel v. Van Tassel, 31 Barb. 439.

1025 Matter of Wolf, 51 Hun, 407.

1026 Matter of Neville, 71 App. Div. 102.

ceeding. But where he may have engaged in transactions having no relation to the practice of his profession or the exercise of his official functions as an attorney, there his misconduct cannot be redressed by a proceeding of this nature. In instances of that character he acts simply as an individual and without reference to the fact that he may be a member of the legal profession.[1027] It is not necessary, however, that the attorney should have been employed "in a legal proceeding." It is sufficient that the attorney received the money in his professional capacity.[1028] The employment of an attorney to collect a debt which is due,[1029] or to prevent the foreclosure of a mortgage,[1030] or to invest money, where the employment was because the person was an attorney,[1031] is professional employment. On the other hand, the remedy will not lie for money received as land agent,[1032] nor to recover the proceeds of a collection by one who had never been engaged in the active practice of law.[1033]

§ 339. Who may move.

The summary proceeding is only entertained on motion of the client, and hence is not ordinarily available to an attorney against his associate,[1034] nor to counsel against his attorney,[1035] nor to one who has advanced money to the attorney for the client,[1036] nor to an officer to compel payment of fees,[1037] but

1027 Matter of Husson, 26 Hun, 130; Matter of Hammann, 37 Misc. 417.

1028 Ex parte Staats, 4 Cow. 76; Grant's Case, 8 Abb. Pr. 357.

1029 Smedes' Ex'rs v. Elmendorf, 3 Johns. 185.

1030 In re Larner, 20 Wkly. Dig. 73.

1031 Grant's Case, 8 Abb. Pr. 357.

See Matter of Sardy, 47 State Rep. 308, 65 Hun, 619, 19 N. Y. Supp. 575, where client was remitted to an action, where attorney was employed to sell real estate or procure a loan thereon, and the relation of attorney and client was denied.

1032 Matter of Dakin, 4 Hill, 42.

1033 Matter of Hillebrandt, 33 App. Div. 191.

1034 Taylor v. Long Island R. Co., 38 App. Div. 595; Matter of Cattus, 42 App. Div. 134; Matter of Hirshbach, 72 App. Div. 79.

1035 Matter of Haskin, 18 Hun, 42.

1036 Hess v. Joseph, 30 Super. Ct. (7 Rob.) 609.

1037 Lamoreux v. Morris, 4 How. Pr. 247.

an exception to the general rule is that an attachment will lie at the instance of a third person from whom the attorney obtains money by fraud,[1038] and where an assignment pending suit is made, with the consent of the attorney, he is subject to the summary remedy at the instance of the assignee,[1039] but not unless the assignment is with his consent.[1040]

§ 340. Procedure.

The application should be made to the court in which the proceedings were had, where the misconduct is connected with such proceedings.[1041] The application is usually in the form of a petition.[1042] The practice where the value of the attorney's services can be readily ascertained, is for the court to decide their value and order the payment over of the balance, but where the affidavit of the attorney in opposition to the motion raises an issue, or the facts are complicated, a reference should be ordered and, on confirmation of the referee's report, an order entered requiring the attorney to pay over any balance.[1043] The attorney is not entitled as a matter of right to a trial by jury[1044] but where the relation of attorney and client,[1045] or the facts, are disputed, the client may be left to an action.[1046] In case the attorney does not obey the order to pay, he should be attached for contempt.[1047] It is proper practice to apply for

[1038] Wilmerdings v. Fowler, 14 Abb. Pr., N. S., 249.

[1039] Gillespie v. Mulholland, 12 Misc. 40, 66 State Rep. 532.

[1040] Matter of Schell, 58 Hun, 440, 34 State Rep. 928; Bowen v. Smidt, 49 State Rep. 647.

[1041] Grangier v. Hughes, 56 Super. Ct. (24 J. & S.) 346; Wiedersum v. Naumann, 10 Abb. N. C. 149.

[1042] As to sufficiency of petition not showing who petitioner is, see Matter of Curtis, 51 App. Div. 434.

[1043] Matter of H———, 87 N. Y. 521; Waterbury v. Eldridge, 52 Hun, 614, 5 N. Y. Supp. 324; Taylor Iron & Steel Co. v. Higgins, 66 Hun, 626, 20 N. Y. Supp. 746, 49 State Rep. 645; Matter of Martin, 73 App. Div. 505; Matter of Hammann, 37 Misc. 417.

[1044] Matter of Fincke, 6 Daly, 111.

[1045] Matter of Sardy, 47 State Rep. 308, 65 Hun, 619, 19 N. Y. Supp. 575.

[1046] Matter of Yeuni, 2 Month. Law Bul. 2; Sackett v. Breen, 50 Hun, 602, 3 N. Y. Supp. 473.

[1047] Matter of Bornemann, 6 App. Div. 524.

an order, on affidavits, that the attorney show cause why he should not be punished as for a contempt because of his misconduct. The attorney may file counter affidavits on the return day of the order, and the court may thereupon order a reference. On the coming in of the report of the referee, an application may be made that an attachment issue against the attorney returnable on the day set for hearing of the referee's report. On the day of the hearing, if the attorney does not appear, the report of the referee may be confirmed and an order made fining the attorney for not paying over the moneys and directing that he be committed to jail until the fine be paid.[1048] Several claimants can not combine in a single proceeding to require an attorney to pay over moneys.[1049]

—— **Demand.** Demand is a condition precedent to an attachment,[1050] and a demand for an excessive amount is sufficient where the attorney refuses to pay anything.[1051]

—— **Parties.** The members of a firm need not be joined as parties to a summary proceeding to compel an attorney to pay over money appropriated to his individual use,[1052] but the remedy should not be granted if a lien on the fund is claimed by other persons who are not made parties.[1053]

—— **Evidence.** The petitioner must make out a clear case but where he has done so, he is entitled to speedy relief without consideration of unsubstantial counterclaims.[1054] Where an attorney is shown to be in the possession of his client's money, and he is called upon to account, he is bound to show in detail what he has done with the money, and to justify its retention or expenditure. He cannot merely state that he has retained it for counsel fees and for moneys which he has paid out on ac-

1048 Matter of Steinert, 24 Hun, 246; Matter of McBride, 6 App. Div. 376.

1049 Matter of Forster, 49 Hun, 114, 17 State Rep. 115.

1050 Ex parte Ferguson, 6 Cow. 596; Cottrell v. Finlayson, 4 How. Pr. 242, 2 Code R. 116.

1051 Ackerman v. Wagener, 29 State Rep. 166, 55 Hun, 608, 8 N. Y. Supp. 457.

1052 Matter of Wolf, 51 Hun, 407, 21 State Rep. 224.

1053 Matter of Forster, 49 Hun, 114.

1054 Matter of Tracy, 1 App. Div. 113; Post v. Evarts, 56 Hun, 641, 31 State Rep. 123.

count of the petitioner.[1055] Where the fund is retained to pay for services and the charge seems excessive, the attorney should produce expert evidence on the questions of the value and necessity of the services rendered.[1056]

7. Attorney's Lien.

§ 341. Nature and kinds of attorneys' liens.

An attorney's lien is of two kinds. One is called the general or retaining lien, and the other the special, particular or charging lien. The "general or retaining lien" is a common-law lien, giving an attorney the right to retain papers, money or other property of his client, until his costs and charges against the client are paid. This lien, springing from possession, is a passive lien, and cannot be enforced by sale, in the absence of statutory provisions. The lien does not attach, unless the papers have come into the possession of the attorney in the course of his professional employment, and not for some special purpose not yet accomplished, nor does it attach to money until that is actually collected and paid to the attorney. It extends, under most modern decisions, to property in the attorney's hands, not only so as to cover costs and charges in the particular case in which the money was collected, but to the extent of the general balance due to the attorney from the client. It does not extend to a judgment until the money is paid to the attorney, as it is rendered effective by possession, and only by possession. A "special or charging lien," so-called, of an attorney is a right to recover out of the proceeds of an action in which the attorney has rendered services, the amount of his charges in that particular action. It is an exception to the general rule, in that it lacks the element of possession, which is essential to ordinary liens.[1057] The theory upon which the special lien is upheld is that the attorney has, by his skill and labor, obtained the judgment, and that hence he should have a lien thereon for his compensation, in analogy to the lien which a mechanic has upon any article which he

[1055] Matter of Raby, 29 App. Div. 225.
[1056] Matter of Raby, 25 Misc. 240.
[1057] Anderson v. Brackeleer, 28 Civ. Proc. R. (Kerr) 306.

manufactures.[1058] In considering the lien, this distinction between the two kinds of liens should be kept in mind, as the liens will be hereafter spoken of as the "special" and the "general" liens.

§ 342. Right to lien independent of agreement.

The Code provides that from the commencement of an action or special proceeding, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, decision, judgment or final order in his client's favor, and the proceeds thereof in whosesoever hands they may come.[1059] The provision extending the lien to services in a "special proceeding" was inserted by amendment in 1899, it having been decided before such amendment that an attorney had no statutory lien for his services in a special proceeding.[1060] This Code provision does not apply to the municipal courts of Buffalo[1061] or to a court of a justice of the peace,[1062] but does apply to surrogate's courts since they have become courts of record.[1063]

§ 343. Agreement for lien and effect thereof.

A lien can be created by a parol agreement.[1064] An agreement for a lien on a judgment for the attorney's services constitutes the attorney the assignee of the judgment to the amount of his services,[1065] and the lien existing by virtue of an agreement that the attorney shall receive a certain portion of the judgment recovered as part compensation for his services, extends to the agreed compensation and operates as an equitable assignment pro tanto thereof.[1066]

1058 Williams v. Ingersoll, 89 N. Y. 508.
1059 Code Civ. Proc. § 66.
1060 Schreyer v. Deering, 30 App. Div. 602.
1061 Drago v. Smith, 92 Hun, 536, 72 State Rep. 418.
1062 Read v. Joselyn, Sheld. 60.
1063 Flint v. Van Dusen, 26 Hun, 606.
1064 Williams v. Ingersoll, 89 N. Y. 508.
1065 Read v. Joselyn, Sheld. 60.
1066 Brown v. City of New York, 9 Hun, 587, 11 Hun, 21.

§ 344. Right to general lien on breach of contract.

An attorney has no general lien upon his client's papers or money for damages arising out of the nonperformance of a contract where no such right is, by their agreement, reserved in favor of the attorney.[1067]

§ 345. Existence of general lien as defense or counterclaim.

The attorney's general lien on funds in his possession continues to exist although his remedy by action for the debt becomes barred by the statute of limitations so that he may set up such lien, when sued by the client to recover possession,[1068] but the attorney can not set up the lien as a counterclaim when sued in another matter.[1069]

§ 346. Facts precluding lien.

The fact that the attorney was not retained by the nominal party in the suit, but by the real party in interest, cannot defeat the attorney's lien on the judgment,[1070] nor does the fact that the judgment is for double costs,[1071] or that the attorney was employed by an officer in an action of replevin against such officer for goods taken, where the judgment creditor had knowledge of the employment, but did not object.[1072] It has also been held that the Code provision that, after the issuing of execution against property, any person indebted to the judgment debtor may pay to the sheriff the amount of his debt, or so much thereof as shall be necessary to satisfy the execution, does not deprive an attorney of his lien for costs on a judgment in favor of such judgment debtor.[1073]

—— **Death of client.** The lien of the attorney on a judgment

1067 Lorillard v. Barnard, 42 Hun, 545.
1068 Maxwell v. Cottle, 72 Hun, 529.
1069 Rochester Distilling Co. v. O'Brien, 72 Hun, 462, 55 State Rep. 149.
1070 McGregor v. Comstock, 28 N. Y. 237.
1071 Ennis v. Currie, 2 Month. Law Bul. 66.
1072 Johnson v. Haynes, 37 Hun, 303.
1073 East River Bank v..Kidd, 13 Abb. Pr. 337, note.

for costs, is not affected by the death of the client, and the attorney may thereafter issue an execution for their collection.[1074]

—— Assignment for creditors or appointment of receiver. The lien is not affected by a general assignment by the client for the benefit of creditors,[1075] nor by the subsequent appointment of a receiver of the property of such client.[1076]

§ 347. Lien for services rendered to executors or administrators.

An attorney has a lien on his client's money received in the course of his employment, notwithstanding the fact that the client is an executor, and the services were rendered and the money received on behalf of the estate,[1077] but an attorney's claim for services in procuring the probate of a will, is against the executor personally, and no lien exists against the property of the estate which may be in his possession.[1078]

§ 348. Extent of lien.

Before the Code of Procedure there was no case where the lien was upheld for more than the taxable costs, but after the enactment of section 303 of the old Code which provided that "all statutes establishing or regulating the costs or fees of attorneys, solicitors and counsel in civil actions, and all existing rules and provisions of law restricting or controlling the right of a party to agree with an attorney, solicitor, or counsel for his compensation are repealed, and hereafter the measure of such compensation shall be left to the agreement, express or implied, of the parties," it was held that, after judgment, an attorney may have a lien thereon for any compensation which his client has agreed to pay him, and to that extent it is said

1074 Lachenmeyer v. Lachenmeyer, 17 Wkly. Dig. 310, 65 How. Pr. 422; Peetsch v. Quinn, 6 Misc. 52, 56 State Rep. 607.

1075 Schwartz v. Jenney, 21 Hun, 33; Matter of H———, 87 N. Y. 521, 63 How. Pr. 152; Ward v. Craig, 87 N. Y. 550; Anderson v. Sessions, N. Y. Daily Reg., March 4, 1884.

1076 Bowling Green Sav. Bank v. Todd, 64 Barb. 146.

1077 Matter of Knapp, 85 N. Y. 284.

1078 Hoes v. Halsey, 2 Dem. Surr. 577, 13 Abb. N. C. 353. Compare Kerngood v. Jack, 38 Misc. 309.

he may be regarded as an equitable assignee of the judgment.[1079] And it is immaterial whether the amount of the attorney's compensation is agreed on or depends on a quantum meruit.[1080]

——**Services rendered in other matters.** The "special lien" of the attorney on a cause of action or on the proceeds of a judgment not in his own hands, does not extend to services other than those rendered in the particular action in which the judgment has been obtained,[1081] so that where an attorney has several actions, and recovers judgment in but one of them, he cannot, in the absence of a special agreement, have a lien on that judgment for his compensation in all the actions;[1082] but the "general or retaining lien," which attaches on possession, covers not only costs and charges in the particular case, but also the general balance due to the attorney from the client,[1083] though where the fund was in the hands of the receiver of the plaintiff corporation, and not either actually or constructively in the attorney's possession, his general lien was held to extend only to disbursements and compensation for services in the particular action.[1084]

§ 349. Persons entitled to lien.

The attorney of record alone is entitled to a lien on a judgment,[1085] and persons who occupy the relation merely of counsel, do not acquire thereby a lien upon the recovery. Their

1079 Coughlin v. New York Cent. & H. R. R. Co., 71 N. Y. 443; St. John v. Diefendorf, 12 Wend. 261; Adams v. Fox, 40 Barb. 442.

1080 Fox v. Fox, 24 How. Pr. 409; Crotty v. McKenzie, 42 Super. Ct. (10 J. & S.) 192.

1081 Anderson v. Brackeleer, 28 Civ. Proc. R. (Kerr) 306; West v. Bacon, 13 App. Div. 371.

1082 Williams v. Ingersoll, 89 N. Y. 508.

1083 Bowling Green Sav. Bank v. Todd, 52 N. Y. 480; Lorillard v. Barnard, 42 Hun, 545; Schwartz v. Jenney, 21 Hun, 33; Matter of H———, 87 N. Y. 521, 63 How. Pr. 152; Ward v. Craig, 87 N. Y. 550; Canary v. Russell, 10 Misc. 597, 63 State Rep. 740, 24 Civ. Proc. R. (Scott) 109.

1084 Anderson v. E. De Brakeleer & Co., 25 Misc. 343.

1085 Kennedy v. Carrick, 18 Misc. 38; Wehle v. Conner, 83 N. Y. 231.

claims, if disputed, can only be established in the form prescribed by law for the recovery of debts.[1086]

§ 350. Time when lien attaches.

Under the common law and the old Code, the lien of an attorney for compensation did not exist before verdict or judgment, except on the papers in his hands. It was only in the case of a settlement privately effected between the parties with the design of defrauding the attorney that the court could insist upon the payment to him of at least the taxable costs, before granting a discontinuance or leave to serve a supplemental answer showing settlement. The Code of Civil Procedure, as originally passed, did not change the law upon this point as it then stood, but the amendment to section 66 of the Code of Civil Procedure, passed in 1879, gave a lien on a cause of action or counterclaim.[1087]

"Defendant's" attorney, in order to be entitled to a lien before judgment, must show that the defendant has set forth a cause of action by way of a counterclaim in the answer to the plaintiff's complaint, since that is the only thing, under the Code, that will give him a lien before judgment.[1088]

§ 351. Property subject to special lien.

The Code provides that the special lien on the cause of action, claim, or counterclaim, shall attach to "a verdict, report, decision, judgment, or final order in the client's favor, and the proceeds thereof in whosesoever hands they may come."[1089] A judgment for costs in favor of defendant, on the dismissal of a complaint, is, it seems, subject to the special lien,

1086 Brown v. City of New York, 9 Hun, 587.

1087 McCabe v. Fogg, 60 How. Pr. 488; Randall v. Van Wagenen, 115 N. Y. 527.

1088 Longyear v. Carter, 88 Hun, 513; Levis v. Burke, 51 Hun, 71; White v. Sumner, 16 App. Div. 70; Fromme v. Union Surety & Guaranty Co., 39 Misc. 105; National Exhibition Co. v. Crane, 167 N. Y. 505.

1089 Code Civ. Proc. § 66; Marvin v. Marvin, 22 Civ. Proc. R. (Browne) 274, and Guliano v. Whitenack, 9 Misc. 562, hold that lien attaches to judgment in hands of assignee, though assignee had no notice.

under a liberal construction of the Code provision,[1090] but it seems that an attorney has no lien on the alimony awarded to his client by a final judgment rendered in her favor in an action for a separation.[1091] The lien of a defendant's attorney on a judgment for costs, which attaches on the rendition of such judgment, is not affected by the provision of the Code providing for a lien from the service of an answer containing a counterclaim, on the client's counterclaim, since it was not the intention of the Code to abridge the attorney's right of lien which had previously existed.[1092] The equitable lien of an attorney has been held to extend to the interest of an after born child in property which was the subject of the litigation, and was thereby preserved for distribution among the heirs.[1093]

—— **Necessity of possession.** As has been before stated in showing the difference between the general and special lien of an attorney, the special lien does not require the attorney to have possession, as is the rule in regard to an ordinary common law lien.[1094]

—— **Cause of action.** The lien on a cause of action, is upon the actual cause of action, and not upon the one alleged in the complaint.[1095] It was formerly held that a special lien could not be created as against a cause of action which was not assignable, such as a cause of action for a tort, so as to transfer any part of the cause of action to the attorney, as against the defendant,[1096] and that an attorney could not obtain any interest in a cause of action which was not assignable, before judgment, even though there was an express agreement between the client and the attorney providing for such

1090 Ennis v. Curry, 22 Hun, 584.

1091 Weill v. Weill, 18 Civ. Proc. R. (Browne) 241.

1092 Bevins v. Albro, 86 Hun, 590, 67 State Rep. 783; Matter of Lazelle's Estate, 16 Misc. 515.

1093 McGillis v. McGillis, 154 N. Y. 532.

1094 Goodrich v. McDonald, 41 Hun, 235, 11 Civ. Proc. R. (Browne) 147.

1095 Palmer v. Van Orden, 49 Super. Ct. (17 J. & S.) 89, 4 Civ. Proc. R. (Browne) 44.

1096 Oliwill v. Verdenhalven, 26 State Rep. 115; Cahill v. Cahill, 9 Civ. Proc. R. (Browne) 241; Roberts v. Doty, 31 Hun, 128.

interest or lien.[1097] This rule, however, has been changed. In Astrand v. Brooklyn Heights Railway Co.,[1098] the question arose as to whether a non-assignable cause of action could be settled before judgment so as to preclude the right of the attorney to continue and prosecute the action to establish his lien on the cause of action for the amount of his agreed compensation. The court held, after a review of the decisions, that the attorney has a lien on a non-assignable cause of action before, as well as after, judgment.

—— **Reports.** The Code provision that the lien shall attach to a report in favor of the client, does not apply, however, to a report on a reference ordered in an interlocutory application under section 1015 of the Code.[1099]

—— **Collateral securities.** The lien for costs extends not only to the judgment but also to all the securities for its payment and satisfaction in his client's hands, such as an undertaking of bail, so that such securities can no more be released or discharged, to the prejudice of the lien, than can the judgment,[1100] and the attorney may take an assignment of the judgment and maintain an action in his own name against the sureties to the undertaking on arrest given in the action.[1101] However, the lien of an attorney for a defendant in an action in which an injunction has been granted will not, where notice thereof has not been given, extend to the undertaking given upon procuring the injunction so as to prevent the sureties therein from setting up a counterclaim against their liability on such undertaking;[1102] and an attorney for a defendant arrested in a civil action has no separate cause of action of his own on the undertaking for the costs awarded to defendant on setting aside the order.[1103]

1097 Coughlin v. New York Cent. & H. R. R. Co., 71 N. Y. 443.

1098 Astrand v. Brooklyn Heights R. Co., 24 Misc. 92; Whittaker v. New York & H. R. Co., 18 Abb. N. C. 11.

1099 Jones v. Easton, 11 Abb. N. C. 114.

1100 Shackelton v. Hart, 12 Abb. Pr. 325, note, 20 How. Pr. 39.

1101 Newberg v. Schwab, 49 Super. Ct. (17 J. & S.) 232.

1102 Lablache v. Kirkpatrick, 8 Civ. Proc. R. (Browne 256, which held that the undertaking was not a collateral security.

1103 Cornell v. Donovan, 14 Daly, 292, 12 State Rep. 117.

—— **Proceeds.** The lien covers the proceeds of a verdict, judgment, etc., in whosesoever hands they may come,[1104] but it was held, in a case based on the statute before the amendment of 1879, that an attorney who has a lien on a judgment cannot follow the proceeds into the hands of third persons, after he has consented that the client may receive them and satisfy the judgment.[1105]

§ 352. Property subject to general lien.

The general lien of an attorney extends to funds in the attorney's hands, and the lien on a mortgage attaches to the money when it is paid to the attorney.[1106] So muniments of title obtained in procuring a right of way for a railroad company, are subject to the lien,[1107] and a lien exists on a fund awarded in condemnation proceedings, increased because of the attorney's services,[1108] but the lien does not extend to money delivered to the attorney by his client for a specific purpose, to which the attorney agrees to apply it,[1109] nor to papers coming into the attorney's hands as trustee and not in his professional capacity.[1110] The lien of an attorney often extends to a fund paid into court, and where the surplus in a foreclosure proceeding is ordered to be paid to the claimant, the lien of the attorney for the claimant attaches thereto.[1111] The lien may extend to a fund in another state, where the right of the client thereto has been established by an action in this state, the lien being claimed for services rendered

1104 Code Civ. Proc. § 66; Peri v. New York Cent. & H. R. R. Co., 152 N. Y. 521.

1105 Goodrich v. McDonald, 112 N. Y. 157.

1106 Maxwell v. Cottle, 72 Hun, 529, 55 State Rep. 127.

1107 Hilton Bridge Const. Co. v. New York Cent. & H. R. R. Co., 84 Hun, 225, 65 State Rep. 669.

1108 Gates v. De La Mare, 49 State Rep. 775, 66 Hun, 626, 20 N. Y. Supp. 837.

1109 In re Larner, 20 Wkly. Dig. 73.

1110 Henry v. Fowler, 3 Daly, 199.

1111 Boyle v. Boyle, 23 Wkly. Dig. 346; Atlantic Sav. Bank v. Hiler, 3 Hun, 209.

in such action.[1112] An attorney employed by a contractor, is not entitled to a lien on papers, as against the owner.[1113]

§ 353. Settlement between parties as affecting lien.

Prior to the amendment of 1879, section 66 of the Code of Civil Procedure simply regulated the agreement an attorney might make for his services, but the amendment of 1879 gave the attorney a lien on the cause of action or counterclaim, as distinguished from the judgment, and it was provided that the lien cannot be affected by any settlement between the parties before or after judgment, and in 1899 the words "or final order" were added so as to prevent settlement before or after final order. It was held, before 1879, that the parties had the right, before judgment, to settle their dispute, and thereby deprive the attorney of any lien which he might have obtained on the rendition of a judgment, except that where the settlement was collusive, with the intention of depriving the attorney of his costs, the settlement was not allowed to prejudice the attorney's right to enforce payment of his "taxable costs,"[1114] notwithstanding that the action was for the recovery of unliquidated damages.[1115] Since the amendment of 1879, however, the attorney's lien exists from the time of the commencement of the action, and cannot be displaced by any settlement between the parties, without the attorney's consent, unless his costs are adjusted and paid. It should be kept in mind, however, that the settlement will not be opened where it is unnecessary so to do in order to protect the attorney,[1116] as where the opposite party has offered to pay the attorney's claim,[1117] since a settlement by the parties, as

[1112] Matter of Hynes, 105 N. Y. 560

[1113] Hilton Bridge Const. Co. v. New York Cent. & H. R. R. Co., 145 N. Y. 390.

[1114] Warner v. Canovan, 5 Alb. Law. J 381; Carpenter v. Sixth Ave. R. Co., 1 Am. Law Reg., N. S., 410.

[1115] Rasquin v. Knickerbocker Stage Co., 12 Abb. Pr. 324, 21 How. Pr. 293.

[1116] Pitcher v. Hoople, 49 State Rep. 356, 66 Hun, 632, 21 N. Y. Supp. 66; Howitt v. Merrill, 113 N. Y. 630.

[1117] Tuttle v. Village of Cortland, 21 Wkly. Dig. 528.

between themselves, is valid, notwithstanding the existence of an attorney's lien,[1118] inasmuch as the client is not bound to continue the litigation for the benefit of his attorneys when he judges it prudent to stop, provided he is willing and able to satisfy his attorney's just claims.[1119] The Code provision does not prevent parties from settling and releasing judgments, suits and controversies, but if the release has the effect of defrauding the attorney of his costs, the court has the power to, and should, set it aside and protect the attorney's lien, though in order to warrant the court in disregarding a settlement and release made in an action, and in permitting a prosecution of the action to final judgment to enforce the lien, it must be shown that to give full effect to them will operate as a fraud upon the attorney or at least to his prejudice by depriving him of his costs or turning him over to an irresponsible client.[1120] Hence, where the attorney has papers belonging to his client in his hands, he should be compelled to first enforce his lien on the papers before being allowed to further prosecute the action.[1121]

—— **Notice of lien.** The rule before 1879, followed by a few decisions since that time, was that notice of the attorney's lien must be given to the adverse party, in so far as the lien extends beyond the taxable costs and disbursements, to protect the attorney against a settlement made in good faith,[1122] but the rule now is that the lien is statutory and all the world must take notice of it, so that a settlement without the knowledge of the attorney, is at the risk of the party so settling.[1123]

[1118] Williams v. Wilson, 18 Misc. 42; Stahl v. Wadsworth, 13 Civ. Proc. R. (Browne) 32.

[1119] Lee v. Vacuum Oil Co., 126 N. Y. 579.

[1120] Poole v. Belcha, 131 N. Y. 200; Young v. Howell, 64 App. Div. 246; Dolliver v. American Swan Boat Co., 32 Misc. 264.

[1121] Dimick v. Cooley, 3 Civ. Proc. R. (Browne) 141.

[1122] Stahl v. Wadsworth, 13 Civ. Proc. R. (Browne) 32; Wright v. Wright, 70 N. Y. 96; Tullis v. Runkle, 3 Month. Law Bul. 62; Bailey v. Murphy, 51 Hun, 643, 4 N. Y. Supp. 579, 22 State Rep. 102; Minto v. Baur, 17 Civ. Proc. R. (Browne) 314, 25 State Rep. 559; Oliwell v. Verdenhalven, 17 Civ. Proc. R. (Browne) 362, 26 State Rep. 115; Rooney v. Second Ave. R. Co., 18 N. Y. 368.

[1123] Peri v. New York Cent. & H. R. R. Co., 152 N. Y. 521; Fenwick v. Mitchell, 34 Misc. 617.

Thus an assignee of a judgment, though no notice is given to him of the attorney's lien, cannot satisfy it without the knowledge of the attorney,[1124] and where an attorney undertakes to prosecute an action for a share of the recovery, no notice to the defendant is necessary for the protection of the lien on the cause of action.[1125]

—— **Effect on rights of attorney for defendant.** The special lien of an attorney for a defendant does not attach until judgment, unless a counterclaim is interposed. Hence, defendant may settle the litigation without regard to his attorney, unless he has interposed a counterclaim or there is fraud and collusion, and in such a case defendant's attorney cannot have the case continued to enforce his rights.[1126] On the same theory, an attorney for a defendant who had interposed no answer, is not entitled to a lien which would authorize him to prosecute an appeal notwithstanding a stipulation by his client waiving such appeal and consenting to dismissal.[1127] So an attorney who appears and answers for defendant with notice that the parties have settled since the commencement of the action, acquires no lien for costs, and the plaintiff should be allowed to discontinue without costs.[1128]

—— **Procedure in case of settlement before judgment.** In case of a settlement before judgment, the attorney may go on with the litigation until judgment, which is to be perfected for the amount of the lien,[1129] or he may bring an action against the adverse party to enforce the lien.[1129a] The attorney cannot proceed in the action after settlement for the purpose of enforcing his lien without leave of court, which,

[1124] Guliano v. Whitenack, 9 Misc. 562.

The name of the attorney on the judgment has been held sufficient notice of the lien to the assignees of the judgment. Marvin v. Marvin, 46 State Rep. 259, 22 Civ. Proc. R. (Browne) 274.

[1125] Keeler v. Keeler, 51 Hun, 505, 21 State Rep. 666; Vrooman v. Pickering, 25 Misc. 277, 28 Civ. Proc. R. (Kerr) 302.

[1126] Longyear v. Carter, 88 Hun, 513, 68 State Rep. 583; White v. Sumner, 16 App. Div. 70.

[1127] Levis v. Burke, 51 Hun, 71, 20 State Rep. 789.

[1128] Howard v. Riker, 11 Abb. N. C. 113.

[1129] Keeler v. Keeler, 51 Hun, 505; McCabe v. Fogg, 60 How. Pr. 488.

[1129a] Fischer-Hansen v. Brooklyn Heights Ry. Co., 173 N. Y. 492.

in a proper case, it is the practice of the court to grant, on notice to all interested parties, where the attorney agrees to prosecute or defend, as the case may be, at his own risk and cost.[1130] The necessity of first obtaining leave of court has been denied in a few cases which are in conflict with the weight of authority.[1131] When a case is made permitting the attorney to proceed in the action, notwithstanding the settlement between the parties and their stipulation to discontinue, it is the duty of the court to direct as to the time and manner of the future prosecution of the action, and to watch the proceedings and doings of the attorney so as to fully protect the rights of both parties, and not unnecessarily annoy or embarrass the defendant when he has acted in good faith.[1132] Cases holding that the remedy is not by an action against the parties,[1133] since the remedy by proceeding in the original action, is exclusive,[1134] are overruled by a recent decision of the court of appeals which holds that the remedies are cumulative.[1134a] Where the case has been settled, after issue joined but before verdict or judgment, the attorney's lien cannot be enforced by a mere motion on the part of the plaintiff's attorney for an order directing defendant to pay the at-

[1130] Oliwill v. Verdenhalven, 26 State Rep. 115; Goddard v. Trenbath, 24 Hun, 182; Dimick v. Cooley, 3 Civ. Proc. R. (Browne) 141; Quinlan v. Birge, 43 Hun, 483; Doyle v. New York, O. & W. Ry. Co., 66 App. Div. 398.

[1131] Forstman v. Schulting, 35 Hun, 504; Pickard v. Yencer, 10 Wkly. Dig. 271. See Wilber v. Baker, 24 Hun, 24.

[1132] Quinlan v. Birge, 43 Hun, 483.

[1133] Tullis v. Bushnell, 65 How. Pr. 465; Sanders v. Souter, 59 Hun, 623, 14 N. Y. Supp. 33.

[1134] Randall v. Van Wagenen, 115 N. Y. 527; Fischer-Hansen v. Brooklyn Heights R. Co., 63 App. Div. 356. A decision which at first seems to be to the contrary is Murphy v. Davis, 19 App. Div. 615, where an attorney sued his client and a guardian who was the original defendant, after a settlement between his client and the guardian, to obtain an accounting by the guardian in order to ascertain the attorney's fee which was to be a certain percentage. The attorney's lien was enforced by action in Adams v. Fox, 40 N. Y. 577, apparently on the ground that equitable relief was necessary and no other adequate remedy existed.

[1134a] Fischer-Hansen v. Brooklyn Heights Ry. Co., 173 N. Y. 492.

torney's costs and counsel fees, or that he have judgment therefor,[1135] and an order setting aside the settlement, does not authorize the attorneys to enter judgment for their costs without bringing the cause to trial,[1136] since it does not determine any of the issues raised by the pleadings, but is a mere license to proceed. It does not even determine that the attorney is entitled to recover from his client the sum he claims.[1137] After the attorney procures the settlement of the cause to be set aside, he must establish the cause of action in issue under the pleadings, before he is entitled to recover his agreed compensation.[1138] Where an action was settled by the parties, without the knowledge of plaintiff's attorneys, who thereafter, but before they had notice of the settlement, entered a judgment against the defendant, a motion by defendant to open such judgment was denied and the judgment was allowed to stand to be used in such way as might be permitted on the application of the attorneys.[1139]

—— **Procedure in case of settlement after judgment.** Where a judgment has been satisfied without regard to the attorney's lien thereon, he cannot issue execution for the sum he considered himself entitled to for counsel fees, but must first invoke the equitable aid of the court by moving to have the satisfaction of the judgment removed from the record and cancelled in the docket, and he should produce evidence to sustain his claim as to the amount of his lien,[1140] but it is no bar to an application to vacate the satisfaction of a judgment that the amount due is disputed. That question can be determined by a reference in the same proceeding.[1141] On a motion by an attorney to vacate a satisfaction of a judgment, the court cannot determine the amount of compensation due the attorney, if any, over and above the amount of the taxed costs,[1142]

1135 Smith v. Baum, 67 How. Pr. 267; Chase v. Chase, 29 Hun, 527.
1136 Pickard v. Yencer, 21 Hun, 403.
1137 Kipp v. Rapp, 7 Civ. Proc. R. (Browne) 316.
1138 Casucci v. Alleghany & K. R. Co., 29 Abb. N. C. 252.
1139 Coster v. Greenpoint Ferry Co., 5 Civ. Proc. R. (Browne) 146.
1140 Ackerman v. Ackerman, 14 Abb. Pr. 229; Foreman v. Edwards, 14 Wkly. Dig. 408.
1141 Commercial Telegram Co. v. Smith, 57 Hun, 176.
1142 Bailey v. Murphy, 136 N. Y. 50.

but where the amount of the attorney's fee is fixed by express agreement with the client at a fair sum, it is proper to determine the extent of the attorney's lien on the hearing of such a motion.[1143] The satisfaction of the judgment is sometimes set aside merely to the extent of the attorney's costs.[1144]

—— **Laches as bar to motion to set aside settlement.** The failure of the attorney to move promptly to set aside a settlement, may constitute such laches as to warrant the refusal to set aside such settlement.[1145]

§ 354. Right of attorney to appeal or resist dismissal of appeal.

The attorney has no right to bring and prosecute an appeal from a judgment against his client against the wishes and at the expense of the client, in order that the attorney may, if successful upon the appeal, obtain a new trial and a favorable judgment, and a chance of collecting his costs of the opposite side by means of such judgment, but the attorney may be allowed to appeal at his own expense and on giving security to protect the client against costs of the appeal.[1146] In a recent case, where an appeal had been taken by defendant, his attorney thereafter moved for leave to withdraw the appeal because of a settlement between the parties, but the attorney of the plaintiff showed by affidavits that he had not been relieved from, or asked to abandon, his representation of the plaintiff, and that he was interested in the action to the extent of one-half of any recovery by the plaintiff, whereupon the motion to withdraw the appeal was denied, and the judgment affirmed.[1147]

§ 355. Priority of lien.

An attorney's lien on a judgment for his costs and compen-

1143 Guliano v. Whitenack, 9 Misc. 562.
1144 Roberts v. Union Elevated R. Co., 84 Hun, 437.
1145 Lee v. Vacuum Oil Co., 126 N. Y. 579.
1146 Adsit v. Hall, 3 How. Pr., N. S., 373.
1147 Stilwell v. Armstrong, 28 Misc. 546.

sation prevails over the lien of a judgment creditor in supplementary proceedings against the party who recovered the judgment,[1148] and where an attorney is employed with an agreement for a contingent fee, his lien on the recovery is superior to that of a judgment creditor of the client.[1149] But the attorney's lien on a fund awarded in condemnation proceedings, is subordinate to a mortgage on the property.[1150] An assignee of the judgment, though without notice, takes subject to the lien and he cannot defeat the claim by asserting that the demand on which the judgment was recovered is fraudulent and fictitious.[1151]

——**As against right of set-off against client.** The general rule at present seems to be that the lien of an attorney on a judgment recovered by him for the amount of his costs is to be regarded as an equitable assignment of the judgment to him, so that the opposing party cannot set-off against such judgment a judgment in his favor against the attorney's client.[1152] A judgment for costs only will sustain an attorney's lien thereon, as against a claim of set-off, whenever it can be done without infringing on the statute of set-off.[1153] There was formerly a recognized distinction as to the rights of parties to a set-off, depending on whether the application was by motion or action. The power of common law courts to compel a set-off of a judgment by motion was based on their supervisory power over their own judgments and suitors in their courts and was governed by no fixed rule, while in ac-

[1148] Dienst v. McCaffrey, 66 State. Rep. 200, 24 Civ. Proc. R. (Scott) 238.

[1149] Palmer v. Palmer, 24 Misc. 217; Zogbaum v. Parker, 55 N. Y. 120; Williams v. Ingersoll, 23 Hun, 284.

[1150] Gates v. De La Mare, 142 N. Y. 307.

[1151] Marvin v. Marvin, 46 State Rep. 259, 22 Civ. Proc. R. (Browne) 274.

[1152] Tunstall v. Winton, 31 Hun, 219; Hovey v. Rubber Tip Pencil Co., 14 Abb. Pr., N. S., 66; Naylor v. Lane, 5 Civ. Proc. R. (Browne) 149, 66 How. Pr. 400, 50 Super. Ct. (18 J. & S.) 97; Place v. Hayward, 3 How. Pr., N. S., 59; Turno v. Parks, 2 How. Pr., N. S., 35; Davidson v. Alfaro, 16 Hun, 353; Delano v. Rice, 21 Misc. 714; Adams v. Niagara Cycle Fittings Co., 10 Am. Cas. 401.

[1153] Hovey v. Rubber Tip Pencil Co., 14 Abb. Pr., N. S., 66.

tions in equity suitors could ask the interference of the court as a matter of legal right.[1154] In the one case, the courts proceed independent of the statute relating to set-offs, while in the other case the court is governed by such statute. Thus it was held that whenever the right of set-off is sought to be enforced by an "action," the lien of the attorney must yield to the statutory right of set-off, inasmuch as the court has no discretion, but must enforce the legal right,[1155] but that where the right is sought to be enforced by a motion, the power of the court is equitable rather than legal, and rests in the discretion of the court.[1156] Subsequently it was held, after the amendment in 1897 of section 66 of the Code of Civil Procedure, that the attorney's lien given by the Code becomes superior to the right to set-off a prior judgment in favor of the opposite party, whether the right is sought to be enforced by a motion or by an action.[1157] The right of set-off does not exist where it is agreed, before verdict or judgment, that any costs recovered by the client shall belong to the attorney,[1158] though it has been held that interlocutory costs, though promised to the attorney, may be set-off.[1159] Recently it has been held that where an interlocutory and a final judgment are both entered in the same action in favor of different parties, the equities of the parties are superior to the lien of the attorneys, and a set-off will be allowed notwithstanding the assignment of one judgment to the attorney and his assignment to a third person, the party being insolvent and the set-off being necessary for the protection of the adverse party, but the case seems to be decided on the theory of the general

1154 Zogbaum v. Parker, 55 N. Y. 120; Davidson v. Alfaro, 16 Hun, 353.

1155 Hovey v. Rubber Tip Pencil Co., 14 Abb. Pr., N. S., 66.

1156 Nicoll v. Nicoll, 16 Wend. 446.

1157 Ennis v. Curry, 22 Hun, 584.

1158 Ely v. Cooke, 28 N. Y. 365; De Figaniere v. Young, 25 Super. Ct. (2 Rob.) 670; Perry v. Chester, 53 N. Y. 240; Garner v. Gladwin, 12 Wkly. Dig. 9, 11 Reporter, 747, 24 Hun, 343; Naylor v. Lane, 50 Super. Ct. (18 J. & S.) 97.

1159 Hoyt v. Godfrey, 3 Civ. Proc. R. (Browne) 118. But see Tunstall v. Vinton, 5 Month. Law Bul. 42.

rights of the assignee of a judgment rather than on the theory of an attorney's lien.[1160]

§ 356. Waiver or loss of lien.

An attorney waives his inchoate right of lien for his fees on the judgment by refusing to render any further services in the action until his bill for previous services is paid,[1161] and the lien is waived by the attorney consenting to the payment of the judgment to the client without any agreement that the lien should be transferred to the fund thus paid, or should follow it any further.[1162] So the execution of a declaration of trust by the attorney, with respect to the subject-matter of an action conveyed to him, waives his lien for services rendered in the action.[1163] On the other hand, delivery of shares of stock, given to the attorney as security by the client, to a receiver of the client, with notice of the lien, is not a waiver thereof.[1164] The attorney's lien for compensation and disbursements upon a judgment, though merged in a transfer to him thereof by his client, is revived upon the transfer being set aside as fraudulent against creditors, notwithstanding his participation in the intent to defraud.[1165]

§ 357. Estoppel to assert lien.

The acts of the attorney may be such as to estop him from insisting on his lien, as where a judgment by default was opened on a stipulation by defendants that plaintiff should have a lien to secure his claim on a judgment recovered by the defendants against a third person, and the attorney for the defendants in the proceeding took the acknowledgment of the defendants to such stipulation and had knowledge of the transaction, in which case, the attorney, by his silence, was held to be estopped from subsequently asserting a lien

1160 Hopper v. Ersler, 1 Ann. Cas. 192.

1161 Tuck v. Manning, 53 Hun, 455, 25 State Rep. 130; Wilshire v. Manning, 17 Civ. Proc. R. (Browne) 175, 53 Hun, 635, 25 State Rep. 633.

1162 Goodrich v. McDonald, 112 N. Y. 157.

1163 West v. Bacon, 164 N. Y. 425.

1164 Cory v. Harte, 13 Daly, 147, 21 Wkly. Dig. 247.

1165 Swift v. Hart, 35 Hun, 128.

on the judgment against the third person in his own favor, for services for nearly its entire amount.[1166] On the other hand, an attorney is not estopped from setting up his lien, by drawing the assignment under which his client's assignee claims, where the assignee did not take for value.[1167]

§ 358. Enforcement of lien.

The mode of protecting an attorney's lien where there has been a settlement, has been already considered. It has been urged that the remedy of an attorney to determine and enforce his lien, is by an affirmative action, in which a jury trial may be had, but it was held that the lien, whether covering only taxable costs or the compensation agreed on, may be enforced in the action itself.[1168] The question has lately arisen as to whether a proceeding to enforce the lien by setting aside a satisfaction of the judgment, is a motion in the action or a special proceeding, and the court of appeals held that inasmuch as the action in which the judgment was rendered had been terminated and the proceeding was between different parties, and conducted as an independent action, that the proceeding was a special proceeding rather than a motion.[1169]

The Code, as amended in 1899, provides that the court, upon the petition of the client or attorney, may determine and enforce the lien.[1170] Such remedy, however, is not exclusive, but cumulative, since a court of equity always has had power to ascertain and enforce liens.[1171] Under this Code provision, the court not only has jurisdiction but it must, either itself or by a reference, in its discretion, determine the amount of a client's indebtedness to his attorney in a proceeding properly instituted.[1172]

[1166] McClare v. Lockard, 121 N. Y. 308.

See, also, Weaver v. Hutchins, 12 State Rep. 661, where attorney was held estopped by not objecting to release of attorney's claim by client.

[1167] Schwartz v. Jenney, 21 Hun, 33.

[1168] Canary v. Russell, 10 Misc. 597.

[1169] Peri v. New York Cent. & H. R. R. Co., 152 N. Y. 521.

[1170] Code Civ. Proc. § 66 as amended by Laws 1899, c. 61.

[1171] Fischer-Hansen v. Brooklyn Heights R. Co., 173 N. Y. 492, 502.

[1172] Matter of King, 168 N. Y. 53; In re Pieris, 81 N. Y. Supp. 927.

—— **Notice to client.** It is improper for the court to make an order enforcing the alleged lien of an attorney, unless notice is given to the client, and an opportunity given to defend.[1173]

—— **Reference.** A reference may be ordered in a proper case, on a petition to enforce the lien.[1174]

—— **In whose name action to enforce judgment for costs should be brought.** An attorney, seeking to enforce his lien for costs on a judgment for costs only, since he is the equitable assignee thereof under the statute, and the record is in itself legal notice of the lien, should sue in his own name, for if he brings the action in the name of his client even with leave of the court for the express purpose of enforcing his lien, a previous assignment by his client of the cause of action and release of the judgment will bar the action.[1175]

—— **Execution and supplementary proceedings.** An attorney who has a lien on a judgment, for services rendered by him in procuring it, being considered as an equitable assignee of the judgment, may issue execution to enforce the lien[1176] and may also institute supplementary proceedings,[1177] but where the judgment has been satisfied on the records by the filing of a certificate as prescribed by the statutes, the satisfaction should first be vacated.[1178] The lien of defendant's attorney on a judgment for costs against plaintiff entitles him to issue body execution against the plaintiff.[1179]

—— **Laches.** The right to enforce the lien may be barred by laches as where the attorney delays for several years in

Compare Rochfort v. Metropolitan St. Ry. Co., 50 App. Div. 261; Fromme v. Union Surety & Guaranty Co., 39 Misc. 105.

1173 Attorney General v. North-America Life Ins. Co., 93 N. Y. 387.

1174 Matter of Thomasson, 63 App. Div. 408; Brown v. City of New York, 9 Hun, 587.

1175 Kipp v. Rapp, 2 How. Pr., N. S., 169.

1176 Van Camp v. Searle, 79 Hun, 134, 61 State Rep. 349.

1177 Merchant v. Sessions, 5 Civ. Proc. R. (Browne) 24; Shaunessy v. Traphagen, 13 State Rep. 754; Anderson v. Sessions, N. Y. Daily Reg., March 4, 1884. Where judgment has passed to a receiver, leave of court is necessary. Moore v. Taylor, 2 How. Pr., N. S., 343.

1178 Crotty v. McKenzie, 42 Super. Ct. (10 J. & S.) 192.

1179 Parker v. Speer, 49 Super. Ct. (17 J. & S.) 1.

moving to set aside a satisfaction of the cause of action, or of the judgment.[1180]

(C) CLERKS OF COURTS.

§ 359. Definition.

The clerk of a court is its officer who keeps the seals and records of the court. The word "clerk," as used in the Code, signifies the clerk of the court, wherein the action or special proceeding is brought, or wherein, or by whose authority, the act is to be done, which is referred to in the provision in which it is used. If the action or special proceeding is brought, or the act is to be done, in or by the authority of the supreme court, it signifies the clerk of the county wherein the action or special proceeding is triable, or the act is to be done.[1181]

§ 360. Appointment.

He is generally appointed by the court and also may be removed by the court, but the clerk of the supreme and county courts is the county clerk who is elected by the people. The question as to the appointment and removal of clerks of particular courts is considered in the chapters relating to the particular courts.[1182]

§ 361. Deputy clerks.

A deputy clerk or clerks are usually provided for by statute, and such deputy has authority to act in a ministerial capacity where the principal is absent.[1183]

§ 362. Office hours.

Clerks must keep open their offices every day except Sun-

1180 Winans v. Mason, 33 Barb. 522; Neill v. Van Wagenen, 54 Super. Ct. (22 J. & S.) 477; Richardson v. Brooklyn City & N. R. Co., 7 Hun, 69.

1181 Code Civ. Proc. § 3343.

1182 See ante.

1183 Lucas v. Ensign, 4 N. Y. Leg. Obs. 142; Jennings v. Newman, 52 How. Pr. 282.

days and holidays from 8 a. m. to 5 p. m. from April to October and from 9 a. m. to 5 p. m. from October to April, except in the counties of New York and Kings where the hours are from 9 a. m. to 4 p. m., except in July and August, when the hours are from 9 a. m. to 2 p. m.[1184]

§ 363. Powers and duties generally.

The clerk files all papers in cases pending in the court, and also bonds or undertakings required to be given in an action or special proceeding in the court.[1185] The clerk of the Appellate Division in each department is required to keep:

(1) A book, properly indexed, in which shall be entered the title of all actions and proceedings which are pending in that court, and all actions or special proceedings commenced in the Appellate Division with entries under each, showing the proceedings taken therein and the final disposition thereof.

(2) A minute book, showing the proceedings of the court from day to day.

(3) A remittitur book, containing the final order made upon the decision of each case, a certified copy of which shall be transmitted to the proper clerk as required by the Code of Civil Procedure.

(4) A book, properly indexed, in which shall be recorded at large all bonds or undertakings filed in his office, with a statement of the action or special proceeding in which it is given, and a statement of any disposition or order made of or concerning it.[1186]

The clerks of courts other than the Appellate Division of the Supreme Court, are required to keep in their respective offices, in addition to the "judgment book" required to be kept by the Code of Civil Procedure:

1. A book, properly indexed, in which shall be entered the title of all civil actions and special proceedings, with

[1184] Laws 1892, c. 686, § 165, as amended Laws 1895, c. 961.

[1185] Rules 2, 3, 4, of General Rules of Practice; Code Civ. Proc. § 816.

[1186] Rule 7 of General Rules of Pratice.

proper entries under each denoting the papers filed and the orders made and the steps taken therein, with the dates of the several proceedings.

2. A book in which shall be entered at large each bond and undertaking filed in his office with a statement showing when filed and a statement of any disposition or order made of or concerning it.
3. Such other books, properly indexed, as may be necessary to enter the minutes of the court, docket judgments, enter orders and all other necessary matters and proceedings, and such other books as the Appellate Division in each department shall direct.[1187]

The clerk has power, as a ministerial officer, to take affidavits,[1188] but can enter or docket judgments in his office only during business hours.[1189] In docketing a judgment, the clerk must enter the names of the parties, the sum recovered, the time to the minute when the roll was filed and when the judgment was docketed in his office, the court in which judgment was rendered, and the name of the attorney for the party recovering the judgment.[1190] The clerk may, without written order of court, correct an error made by him in his minutes, so as to conform the entry to the decision made.[1191] He is not bound to take from the post office a letter from a sheriff containing process, on which the postage is not paid.[1192] It is the duty of the clerk to assess the amount of the judgment, where judgment is taken by default in certain actions on contract,[1193] and to act as guardian ad litem for an infant defendant where appointed by the court or a judge,[1194] and to tax all costs awarded to a party by statute or by the court, except that the court may direct that interlocutory costs, or costs

1187 Rule 7 of General Rules of Practice.
1188 Code Civ. Proc. § 842; Lynch v. Livingston, 6 N. Y. (2 Seld.) 422.
1189 Rule 8 of General Rules of Practice.
1190 Code Civ. Proc. § 1246.
1191 Smith v. Coe, 30 Super. Ct. (7 Rob.) 477.
1192 Jenkins v. McGill, 4 How. Pr. 205.
1193 Code Civ. Proc. §§ 1212, 1213.
1194 Code Civ. Proc. § 472.

in a special proceeding, be taxed by a judge, but such taxation or a re-taxation by the clerk may be reviewed by the court.[1195]

The powers and duties of a clerk of court are so numerous and diversified that it will not be attempted to fully discuss them at this time, but their consideration in detail will be left for future chapters relating to the particular proceedings in which the clerk is called upon to act.

§ 364. Liabilities.

The clerk may be liable to a judgment creditor for failure to properly docket the judgment.[1196] He may also be punished by fine and imprisonment, or either, for a misbehavior in his office or trust, or for a willful neglect or violation of duty therein, or for disobedience to a lawful mandate of the court or of a judge thereof.[1197]

§ 365. Restrictions connected with office.

The clerk cannot practice as attorney in the court of which he is clerk,[1198] and a clerk of a court of record within either of the counties of New York or Kings, cannot be appointed a referee, receiver or commissioner, except by the written consent of all the parties to the action or special proceeding, other than parties in default for failure to appear or to plead.[1199]

§ 366. Effect on proceedings of default or negligence of clerk.

The default or negligence of a clerk by which the adverse party has not been prejudiced, is cured by verdict or judgment.[1200]

§ 367. Fees of clerk.

Questions relating to the fees of a clerk of court will be considered in a subsequent chapter.[1201]

1195 Code Civ. Proc. §§ 3262, 3265.
1196 Blossom v. Barry, 1 Lans. 190.
1197 Code Civ. Proc. § 14, subd. 1.
1198 Code Civ. Proc. § 61.
1199 Code Civ. Proc. § 90; Moore v. Taylor, 40 Hun, 56.
1200 Code Civ. Proc. § 721.
1201 See chapter on costs in subsequent volume.

(D) SHERIFFS.

§ 368. Duties.

A sheriff is elected in each county for the term of three years. He is an officer of courts of record and is required to appoint constables to attend the terms of court.[1202] The sheriff also appoints under sheriffs and deputies. He executes mandates, a mandate being defined as a writ, process, or other written direction, issued pursuant to law, out of a court, or made pursuant to law by a court, or a judge, or a person acting as a judicial officer, and commanding a court, board, or other body, or an officer, or other person, to do, or to refrain from doing, an act therein specified.[1203] He must give a receipt, if demanded, to the person delivering the mandate to him,[1204] and when he serves the mandate, he must, on request, deliver a copy thereof.[1205] He must make a return of his proceedings, on the mandate, under penalty of fine or imprisonment or liability for damages. Such return may be made, by depositing the mandate in the post office, addressed to the clerk of court, unless the sheriff and the clerk reside in the same place.[1206]

—— **Compelling performance.** Rule 6 of the general rules of practice provides that at any time after the day when it is the duty of the sheriff to return, deliver, or file any process or other paper, by the provisions of the Code of Civil Procedure, or by the rules of the courts, any party entitled to have such act done, except where otherwise provided by law, may serve on the officer a notice to return, deliver, or file such process, or other paper, as the case may be, within ten days, or show cause, at a special term to be designated in said notice, why an attachment should not issue against him.

—— **On termination of term of office.** On the expiration of the sheriff's term of office, and the service on him of the certificate of office given his successor, he is required to deliver

1202 Code Civ. Proc. § 97.
1203 Code Civ. Proc. § 3343, subd. 2.
1204 Code Civ. Proc. § 100.
1205 Code Civ. Proc. § 101.
1206 Code Civ. Proc. §§ 102, 103.

to such successor the jail or jails and prisoners therein, and all papers and mandates in his hands except those which he has fully executed or has begun to execute, by the collection of money thereon, or by a seizure of or levy on money or other property, in pursuance thereof.[1207]

§ 369. Liabilities.

It is not within the scope of a practice book to enumerate the liabilities which a sheriff may incur, but reference should be made to chapter two of the Code and to chapter seven in so far as it treats of arrest pending action.

§ 370. Disabilities connected with office.

A sheriff and his deputies are disqualified to act as trial jurors[1208] or to practice law as attorneys.[1209] A sheriff, under-sheriff, or deputy-sheriff, cannot purchase any of the property sold by him at an execution sale,[1210] except where he is a party to the action.[1211]

§ 371. Trial of claims to property.

If a sheriff has reasonable grounds of doubt on the question of property, he is bound, if no indemnity is tendered to him by the plaintiff, to call a jury to try the title to the property. If they find it not to be the defendant's in the execution, he is justified in returning the execution nulla bona, unless an indemnity is then tendered to him. If it is, he is bound to proceed, notwithstanding the finding of the jury. But a plaintiff is never bound to tender an indemnity, until a jury have passed on the question of property.[1212] The Code provides that where the title to, or right of possession of, goods or effects in his hands by virtue of a mandate, is disputed, the sheriff shall notify as many persons as necessary to form a

1207 Code Civ. Proc. §§ 182-189.
1208 Code Civ. Proc. § 1029.
1209 Code Civ. Proc. § 62.
1210 Code Civ. Proc. § 1387.
1211 Jackson v. Collins, 3 Cow. 89.
1212 Curtis v. Patterson, 8 Cow. 65.

jury of twelve, and that on the trial, witnesses may be examined on behalf of both sides. A subpoena may issue to compel the attendance of witnesses, with like effect as in other cases, except in regard to the judge who may issue a warrant. The sheriff or under-sheriff must preside on the trial. The witnesses must be sworn and be examined orally in the presence of the jury.[1213] The payment of the fees is specifically provided for.[1214]

§ 372. Fees.

The sheriff's fees are specifically provided for[1215] and provision made as to the mode of their collection.[1216]

§ 373. Coroner as sheriff.

Where the sheriff is a party, a coroner is required to act as sheriff.[1217]

(E) STENOGRAPHERS.

§ 374. Appointment, removal, qualifications and oath.

Stenographers appointed by a court, are officers of such court, and generally hold office during the pleasure of the court. They must be skilled in the stenographic art, and, before entering on their duties, must take the constitutional oath of office.[1218]

§ 375. Duties.

It is the duty of a stenographer to take full stenographic notes of the testimony and of all other proceedings in the cause, except when the judge dispenses with his services. He must furnish to the parties a transcript of his notes on being paid therefor.[1219]

1213 Code Civ. Proc. § 108.
1214 Code Civ. Proc. § 109.
1215 Code Civ. Proc. § 3307.
1216 Code Civ. Proc. § 3309.
1217 Code Civ. Proc. §§ 172-181.
1218 Code Civ. Proc. § 82.
1219 Code Civ. Proc. § 83 et seq.

§ 376. Compensation, etc.

The compensation is provided for by the Code and special provisions are made for stenographers for particular courts and courts in particular districts and for temporary and assistant stenographers.[1220]

(F) INTERPRETERS.

§ 377. Appointment, qualifications, etc.

An interpreter is often required where a witness cannot speak the English language, and in some of the courts in certain districts an interpreter is appointed by the court or judges, as an officer of the court. Thus the Code provides that the justices of the supreme court for the second judicial district, residing in Kings county, may appoint an interpreter or interpreters to attend the term of the courts of record, except the county court and surrogate court, held in Kings county, at which issues of fact are triable.[1221] It has been held that such Code provision did not, by implication, repeal chapter 249 of the Laws of 1869 which also authorized the appointment of an interpreter by the board of supervisors of the county of Kings, but that an interpreter might be appointed under both statutory provisions.[1222] In the New York city court, an interpreter is appointed by the clerk of the court,[1223] and the county judges of Kings county may appoint and remove an interpreter to attend the sessions of the county court and of the surrogate court.[1224] An interpreter has been held to be not an officer, but merely an attendant,[1225] but the interpreter of the late district court of the city of New York was held an officer of the court and not of the city government.[1226] The interpreter should be

[1220] Code Civ. Proc. §§ 87, 88, 251-262, 2513, 3311. Laws 1881, c. 369. Laws 1882, c. 173, c. 325. Laws 1886, c. 401. For collection of cases as to fees of stenographers, see 12 Abb. Cyc. Dig. 267.

[1221] Code Civ. Proc. § 94.

[1222] People ex rel. Criscolla v. Adams, 89 Hun, 284, 70 State Rep. 512.

[1223] Code Civ. Proc. §§ 333, 334.

[1224] Code Civ. Proc. § 360.

[1225] Rosenthal v. City of New York, 6 Daly, 167.

[1226] Goettman v. City of New York, 6 Hun, 132.

disinterested and thoroughly conversant with at least one foreign language, it having been held that where a person who understood no foreign language had accepted the position of interpreter, he could not recover the salary therefor.[1227] The interpreters are appointed to interpret one or several languages and are designated as the "German interpreter," etc.

ART. XII. CONTEMPT OF COURT.

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1227 Conroy v. City of New York, 6 Daly, 490.

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§ 378. Scope of subchapter.

This chapter will cover in general the question of what acts constitute a contempt of court. The procedure will be treated of in a subsequent chapter and the question of what constitutes a disobedience of a particular order or writ, and the punishment therefor, will be considered in connection with the chapters relating to such orders or writs.

§ 379. Contempts as civil or criminal.

There are two distinct classes of contempts, private contempts and public contempts. Both were known to and recognized by the common law, and the courts were held to possess an inherent power of punishing by process of contempt any disregard of their authority, both for the benefit of their suitors, and for the protection of their own order and dignity. Necessarily the common-law power was very broad and vested large discretion in the courts. These became in some instances both accuser and judge, and this was especially so where the contempt was of a public nature, and no private person stood as complainant and sufferer.[1228] The main line of distinction between criminal (public) and civil (private) contempts is that the one is an offense against public justice, the penalty for which is essentially punitive, while the other is an invasion of private right, the penalty for which is redress or compensation to the suitor.[1229] Thus the failure to pay alimony as awarded is a civil rather than a criminal contempt.[1230] The object of the former is to protect the rights of private parties, and of the latter to maintain the dignity of the court, and to punish people guilty of willful disobedience to its mandates. In the case of a civil contempt, the purpose being to preserve

[1228] People ex rel. Munsell v. Court of Oyer & Terminer, 101 N. Y. 245; Yates v. Lansing, 9 Johns. 395.
[1229] King v. Barnes, 113 N. Y. 476.
[1230] Doyle v. Doyle, 4 Civ. Proc. R. (Browne) 265.

private rights, it is immaterial whether the contempt complained of was designedly or negligently committed. If, for instance, a person transfer property, or do any other act, in disobedience of an injunction or other order, it can make no difference to the injured suitor whether it was done innocently or with evil intent. His loss is the same in either event, and proceedings to punish the offender, with a view of adjusting the rights of the parties, would look to indemnity only; of course, if the disobedience was willful, the court could, at the same time that it enforced indemnity, inflict punishment for a criminal contempt. On the other hand, if the only purpose of the proceeding is to punish the offender and maintain the dignity of the court, the disobedience must be designed and willful, and hence the law terms this a criminal contempt. If, for example, one, after careful examination, wrongly interpret, and, through this mistake, disobey an order, the majesty of the law is not offended, nor the dignity of the court impaired; and, as he is innocent of willful offence, the infliction of punishment could have no justification.[1231]

Other provisions of the Codes have been enacted without keeping this classification in view, but, if some confuse, none of them destroy it. By section 243 of the Code of Criminal Procedure a grand juror may be challenged as a minor, an alien or insane, or as prejudiced and not impartial toward the party challenging, and by section 243 his attempt to serve is punishable as a contempt. It is not called a criminal or public contempt, and is not made such, but in its nature was evidently deemed an act which rather violated the private or particular right of the party challenging, and so belonged as it was left by the Code in the class of private contempts occurring in a criminal action. By section 344, and those which follow, a prisoner may apply to remove his case from a court in which the indictment is pending, and for that purpose may apply to a judge for a stay, but if the application is denied, a further appeal to another judge is forbidden and made punishable as a contempt. Here again the prohibited act respects primarily the private right of the accused, and is classed as a

1231 People ex rel. Kelly v. Aitken, 19 Hun, 329.

simple contempt and not denominated criminal. But since it does also respect public justice, and there is no suitor to be indemnified, it hardly belongs where it is plaeed, and some consciousness of this is evidenced by the further provision of the section that it shall also be punished as a misdemeanor. Section 619 makes disobedience to a subpoena, or refusal to be sworn or testify, a criminal contempt, and section 635 extends that to a conditional examination.[1232] The Code defines what acts, "and no others," shall constitute a criminal contempt, and also what acts constitute a civil contempt, though acts not specially designated, may constitute a civil contempt inasmuch as the provision relating thereto, in the last subdivision, makes acts punishable at common law as a civil contempt, still punishable. Many acts constitute both criminal and civil contempts and may be punished as either.

§ 380. Contempts in presence, and out of presence, of court.

Contempts may also be classified as direct or constructive contempts according to whether committed in the immediate view and presence of the court or committed out of court. The only practical reason for distinguishing between such contempts, however, is the difference in the procedure to punish.

§ 381. Power of courts and officers to punish.

Superior courts of record have inherent power to punish for contempt but the rule at common law was otherwise as to inferior courts though the statutes have generally conferred such power on inferior courts. Thus, under the Code, a justice of the peace may punish a criminal contempt.[1233] The Code also provides that officers other than a judge, may punish. Thus a referee may punish for contempt in proceedings before him.[1234]

—— **Disobedience to order made by judge out of court.** Disobedience to an order made by a judge out of court may be

1232 People ex rel. Munsell v. Court of Oyer & Terminer, 101 N. Y. 245.

1233 Code Civ. Proc. § 2870.

1234 Code Civ. Proc. § 1018.

punished by the court itself[1235] if the order is made in an action pending in the court.[1236] On the other hand, a judge out of court has no authority to punish as for a contempt, a disobedience of an order made by him, in a statutory proceeding before him, unless authority so to punish is expressly conferred by law.[1237]

§ 382. Court its own judge of contempts.

Every court is its own judge of contempts committed against it, and as a general rule the propriety of a commitment for contempt is not examinable in any other court than the one by which it was awarded, except where the act is necessarily innocent or justifiable.[1238]

§ 383. Acts constituting criminal contempt.

The acts for which a court of record may punish for a criminal contempt, are specified in the Code,[1239] and it is provided that no other acts than those specified warrant punishment for criminal contempt.[1240] Thus it seems that a client maliciously instituting disbarment proceedings cannot be punished for contempt, because such act is not among those enumerated as criminal contempts.[1241] The acts specified are as follows:

—— **(1) Disorderly behavior.** Disorderly, contemptuous or insolent behavior committed during the sitting of a court of record, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority, may be punished. Examples of acts coming within this subdivision are the creating a positive disturbance and an

1235 Wickes v. Dresser, 4 Abb. Pr. 93; Hilton v. Patterson, 18 Abb. Pr. 245.

1236 People ex rel. Geery v. Brennan, 45 Barb. 344.

1237 People ex. rel. Geery v. Brennan, 45 Barb. 344.

Supplementary proceedings, and others, are governed by statute.

1238 People ex rel. Hackley v. Kelly, 24 N. Y. 74; Heerdt v. Wetmore, 25 Super. Ct. (2 Rob.) 697.

1239 Code Civ. Proc. § 8.

1240 See People ex rel. Munsell v. Court of Oyer & Terminer, 101 N. Y. 245, 254.

1241 Matter of Dunn, 27 App. Div. 371.

open and constant defiance of the court in the carrying on of its orderly and regular business[1242] or the act of counsel in interrupting proceedings by instructing a witness not to answer questions.[1243] The question has arisen as to what acts are committed in "immediate view and presence" of the court, and it has been held that the acts of a newspaper reporter in secreting himself in a room into which the jury of a court of oyer and terminer were about to retire, remaining there and overhearing their deliberations, taking notes thereof, and subsequently publishing his recollections of the debate between the members of the jury, amount to a criminal contempt committed in the immediate view and presence of the court.[1244] Communicating with the grand jury concerning a matter before them, without their request, was a contempt at common law, but an officer of the Society for the Prevention of Cruelty to Animals has been exonerated though he communicated with the jury, where he acted in good faith, believing he had a right so to do as a public officer.[1245]

—— **(2) Breach of peace, noise, etc.** Breach of the peace, noise, or other disturbance, directly tending to interrupt its proceedings, may be punished as a criminal contempt. This subdivision seems too plain for argument and applies to acts of bystanders.

—— **(3) Wilful disobedience to mandate.** Wilful disobedience to a lawful mandate of a court of record is punishable as a criminal contempt. This subdivision is in nearly the same words as the provision making a civil contempt the "disobedience to a lawful mandate of the court." The difference is that in the one case the disobedience must be "wilful" while in the other case it must "defeat, impair, impede or prejudice" some right or remedy of the party.[1246] Because of this similarity the question of disobedience as constituting a criminal or a

1242 Falkenberg v. Frank, 20 Misc. 692.

1243 Heerdt v. Wetmore, 25 Super. Ct. (2 Rob.) 697.

1244 People ex rel. Choate v. Barrett, 56 Hun, 351, 30 State Rep. 728, 24 Abb. N. C. 430.

1245 Bergh's Case, 16 Abb. Pr., N. S., 266.

1246 People ex rel. Negus v. Dwyer, 90 N. Y. 402; Doyle v. Doyle, 4 Civ. Proc. R. (Browne) 265.

civil contempt will be treated of together and not apart. This subdivision applies solely to a mandate of the "court." It was so held where a juror in a criminal case visited the scene of the crime, such act not constituting a contempt though it was in violation of the "statutes," it not being in violation of a "mandate of court."[1247] Furthermore the resistance must be to a mandate of a "court of record" as distinguished from a mandate issued by a judge[1248] or other officer.[1249] The "willful" disobedience means conduct intentionally and designedly at variance with the mandate of the court. The disobedience need not be malicious, but it must be in pursuance of an intent to disregard the mandate of the violated order,[1250] though it has been said that the intent required to be proved is not an intent to violate the law (or the order of the court), but to do the act which the law (or the order of the court) forbids.[1251] A "mandate," within this subdivision, includes not only the written writ, process, or direction issued out of, or by, a court, commanding the doing, or refraining from doing, an act therein specified (as defined in Code Civ. Proc. § 3343, subd. 2), but also any "oral" or written command, order or direction of a court which it is authorized to make.[1252] It seems that this subdivision has no application to disobedience of a "judgment,"[1253] and even a "direction" or command inserted in a judgment, "to pay forthwith on demand," is not a "mandate."[1254] However, conceding that a direction in a judgment can be considered a mandate, within the statutory definition of the term, the direction must be one "made pursuant to law," and as the effect of Code Civ. Proc. §§ 1240, 1241, is to render any process as a direction for the enforcement of a judgment

[1247] People ex rel. Munsell v. Court of Oyer & Terminer, 36 Hun, 277. On appeal, 101 N. Y. 245.

[1248] People ex rel. Soc. for Prevention of Cruelty to Children v. Gilmore, 26 Hun, 1.

[1249] Sherwin v. People, 100 N. Y. 351.

[1250] People ex rel. Kelly v. Aitken, 19 Hun, 329.

[1251] Gage v. Denbow, 17 State Rep. 515.

[1252] People ex rel. Illingworth v. Court of Oyer & Terminer, 10 App. Div. 25.

[1253] Fassett v. Tallmadge, 14 Abb. Pr. 188.

[1254] People ex rel. Fries v. Riley, 25 Hun, 587.

for the payment of money, except an execution, illegal, a disobedience of such unlawful mandate, is not a criminal contempt.[1255]

—— **(4) Resistance to mandate.** Resistance wilfully offered to the lawful mandate of a court of record, is the fourth act enumerated as subject to punishment. Such an act is also punishable as a civil contempt and will be considered in discussing such act as a civil contempt.

—— **(5) Refusal of witness to attend or testify.** Contumacious and unlawful refusal to be sworn as a witness, or, after being sworn, to answer any legal and proper interrogatory. Leaving out the words "contumacious and unlawful" such act is among those enumerated as a civil contempt and will be considered thereunder.

—— **(6) Publication of proceedings of court.** Publication of a false or grossly inaccurate report of its proceedings, as distinguished from a true, full and fair report of a trial, argument, decision, or other proceeding therein, is punishable. Misrepresentations in advertisements referring to the modification of an injunction, do not, however, amount to "the publication of a false or grossly inaccurate report" of the court's proceedings,[1256] and the speaking or writing of words denouncing the action of a court or judge, or even imputing dishonesty to him, is not punishable under this subdivision, though such act was a criminal contempt at common law.[1257] Furthermore the fact that the accusation and denunciation of a judge for his official action in a particular case, is libelous, does not make it a contempt of court. The only publications which constitute such contempt are those which contain a false or grossly inaccurate report of its proceedings.[1258]

§ 384. Acts constituting civil contempt.

The Code sets forth the acts for which a court of record

[1255] People ex rel. Fries v. Riley, 25 Hun, 587.

[1256] Morrison v. Moat, 4 Edw. Ch. 25.

[1257] In re Griffin, 15 State Rep. 400. See People ex rel. Davis v. Compton, 8 Super. Ct. (1 Duer) 512.

[1258] People ex rel. Barnes v. Court of Sessions of Albany County, 147 N. Y. 290.

may punish as for a civil contempt.[1259] It should be noted that the Code provision only applies to courts of record.[1260] The civil contempt for which punishment may be imposed is "a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding pending in the court, may be defeated, impaired, impeded or prejudiced."[1261]

The act must injuriously affect the rights or remedies of a "party" to a civil action or proceeding which was "pending at the time of the commission of the act."[1262]

The acts punishable as a civil contempt, must be such acts as will "defeat, impair, impede or prejudice" a right or remedy of a party to a civil action or special proceeding. In this respect, a civil differs from a criminal contempt.[1263] A good example of this rule is found in a recent case where a defendant in a personal injury suit sought to punish as for a civil contempt a person who had furnished witnesses for plaintiff with typewritten copies of the testimony they were to give. It was held that as defendant had succeeded at the trial, its rights were not in any way affected so that the act, nefarious as it was, could not be the basis of a civil contempt.[1264] However an actual loss or injury need not be shown, it seems, as section 2284 of the Code specifically provides for the punishment "where it is not shown that such an actual loss or injury has been produced."[1265] In some cases injury will be presumed without proof as where a receiver fails to pay over moneys in his hands on proper demand[1266] or where there is a refusal to pay costs ordered to be paid to the attorney of a party by one beneficially interested in the suit.[1267]

[1259] Code Civ. Proc. § 14.

[1260] As to criminal contempt, see People ex rel. Soc. for Prevention of Cruelty to Children v. Gilmore, 26 Hun, 1.

[1261] Code Civ. Proc. § 14.

[1262] Schreiber v. Raymond & Campbell Mfg. Co., 18 App. Div. 158.

[1263] Stubbs v. Ripley, 39 Hun, 626.

[1264] Noster v. Metropolitan St. Ry. Co., 30 Misc. 722.

[1265] People ex rel. Duffus v. Brown, 46 Hun, 320.

[1266] People ex rel. Lawyers' Surety Co. v. Anthony, 7 App. Div. 132.

[1267] Tucker v. Gilman, 37 State Rep. 958, 20 Civ. Proc. R. (Browne) 397.

—— **(1) Acts of officers.** The first ground, under the Code, is where an attorney, counsellor, clerk, sheriff, coroner, or other person, in any manner duly selected or appointed to perform a judicial or ministerial service, misbehaves in his office or trust, or is guilty of a wilful neglect or violation of duty therein, or disobeys a lawful mandate of the court, or of a judge thereof, or of an officer authorized to perform the duties of such a judge. This subdivision would seem to be broad enough to include any officer of court, but to not apply to a private person. As has been already stated, an attorney may be summarily required to pay over money to his client, in proper cases, under penalty of being punished for a contempt, and he may also be punished for advising his clients to disobey an order.[1268, 1269] The disbarment of an attorney for acts of contempt has already been considered.[1270] Under this subdivision, a stenographer may be punished as for a contempt for refusing to furnish the minutes taken by him at the statutory rate,[1271] but a sheriff has been held not guilty of contempt in neglecting to execute process, where he has acted in good faith, under a mistake of law.[1272]

—— **(2) Fictitious sureties or other deceit.** The second ground, under the Code, is where a party to an action or special proceeding, puts in fictitious bail or a fictitious surety, or is guilty of any deceit or abuse of a mandate or proceeding of the court. This provision has been applied where the security was to obtain the discharge of a mechanic's lien,[1273] but it has been held that offering a bond with an insolvent surety to discharge a mechanic's lien cannot be punished as a contempt where the party has simply requested the consent of the attorney that the amount of the security be given at the sum named and no other proceedings are taken on the ground that the surety is insolvent, and the lienors have not been noticed to appear in court for the justification of the surety.[1274]

1268, 1269 King v. Barnes, 113 N. Y. 476.

1270 See ante, § 296.

1271 Cavanagh v. O'Neill, 20 Misc. 233, 79 State Rep. 789.

1272 Second Nat. Bank of Oswego v. Dunn, 63 How. Pr. 434, 2 Civ. Proc. R. (Browne) 259.

1273 McAveney v. Brush, 1 App. Div. 97.

1274 Matter of Wilkes, 62 State Rep. 224.

Notwithstanding that this subdivision applies only to parties, it is held that the attorney, as well as the party, may be punished,[1275] as may a third person who conspires with a party to impose on the court a worthless surety;[1276] and a surety on an undertaking who justifies by false testimony, may be punished, though the surety is not a party.[1277] It is no excuse that the attorney for the opposing party did not require the sureties to justify.[1278] The statement of the surety must, however, have been false at the time of making, as distinguished from some future time,[1279] and if the statement of the surety is based on the supposition that certain demands against him were not collectible he cannot be punished,[1280] and the false justification is not a contempt when it does not injuriously affect the rights or remedies of any party to an action or special proceeding "pending at the time of justification" as where there is false swearing by a surety upon a bond given to indemnify a sheriff upon levying an attachment, and contempt proceedings are instituted by a third person not a party to the action whose property is seized under the attachment.[1281]

The second clause of the subdivision relates to one guilty of any deceit or abuse of a mandate or proceeding of the court. It is held thereunder that the act of a party to whom an inspection of parts of his adversary's books is permitted by the court, in breaking open and examining parts of books sealed up in the master's office, is a contempt,[1282] as is the bringing of a fictitious suit, or so to use the name of another, without his privity or consent,[1283] or the obtaining money by an

1275 Foley v. Stone, 18 Civ. Proc. R. (Browne) 190, 30 State Rep. 834.

1276 Hull v. L'Eplatinier, 5 Daly, 534.

1277 Egan v. Lynch, 49 Super. Ct. (17 J. & S.) 454; People ex rel. Wise v. Tamsen, 17 Misc. 212; Matter of Hay Foundry & Iron Works, 27 Civ. Proc. R. (Kerr) 80; Diamond v. Knoepfel, 3 State Rep. 291.

Contra,—Norwood v. Ray Mfg. Co., 11 Civ. Proc. R. (Browne) 273.

1278 Matter of Hopper, 9 Misc. 171.

1279 Schmidt v. Livingston, 77 State Rep. 494, 19 Misc. 353.

1280 Nathans v. Hope, 100 N. Y. 615.

1281 Schreiber v. Raymond & Campbell Mfg. Co., 18 App. Div. 158.

1282 Dias v. Merle, 2 Paige, 494.

1283 Butterworth v. Stagg, 2 Johns. Cas. 291.

order of the court, procured by fraud.[1284] On the other hand, interposing a false verified answer in an action is not punishable as a contempt. It is so held in a late decision of the court of appeals,[1285] though the supreme court had previously held the contrary.[1286] It has been claimed and held that such act was a "deceit or abuse of a mandate or proceeding of the court" but the court of appeals holds, in the case cited, that an answer is not "a proceeding of the court."

—— **(3) Disobedience to order or mandate of court.** As a third ground, a party to the action or special proceeding, an attorney, counsellor or other person may be punished for the non-payment of money, ordered or adjudged by the court to be paid, in a case where by law execution cannot be awarded for the collection of such sum, or for any other disobedience to a lawful mandate of the court. The order must be for the payment of a "definite" amount.[1287] But a person shall not be arrested or imprisoned for the non-payment of costs, awarded or otherwise than by a final judgment, or a final order, made in a special proceeding instituted by state writ, except where an attorney, counsellor, or other officer of the court, is ordered to pay costs for misconduct as such, or a witness is ordered to pay costs on an attachment for non-attendance,[1288] and except in a case where it is otherwise specially prescribed by law, a person shall not be arrested or imprisoned for disobedience to a judgment or order, requiring the payment of money due upon a contract, express or implied, or as damages for non-performance of a contract.[1289] The last provision has been sought to be applied to a disobedience by the defendant in an action to an order made upon setting aside a judgment by default against plaintiff, and directing defendant to restore the money withdrawn under such judgment, which had been deposited with the county clerk to discharge the lien. It was claimed that the

1284 Wilmerdings v. Fowler, 14 Abb. Pr., N. S., 249.
1285 Fromme v. Gray, 148 N. Y. 695.
1286 Martin Cantine Co. v. Warshauer, 7 Misc. 412.
1287 Rowley v. Feldman, 66 App. Div. 463.
1288 Code Civ. Proc. § 15.
1289 Code Civ. Proc. § 16.

law implies a promise to restore money obtained by means of a judgment subsequently reversed or set aside and that therefore the order required the payment of money due on an implied contract, but it was held that an implied promise could not be inferred for the reason that the return of the deposit was required before the rights of the parties interested therein had been determined, and which were still awaiting final determination.[1290] Section 2268 of the Code provides that a warrant to commit may issue without notice where the offense consists of a neglect or refusal, after demand, to obey an order of the court requiring the payment of costs or of a specified sum of money. This section, however, is held to be qualified by the section providing that contempt proceedings are allowable in such cases only when an execution cannot be issued for the collection of the sum.[1291] This section applies to disobedience of an order requiring an assignee for benefit of creditors to pay out of the moneys in his hands a certain amount to a preferred creditor.[1292] The matter of disobedience will be treated of in a subsequent paragraph and attention is called to the similar clause in the definition of criminal contempts and what is said thereunder.

—— **(4) Interference with proceedings.** The fourth statutory ground embraces the act of a person, assuming to be an attorney or counsellor, or other officer of the court, and acting as such without authority; the rescuing any property or person in the custody of an officer, by virtue of a mandate of the court; the unlawfully detaining, or fraudulent and wilfully preventing, or disabling from attending or testifying, a witness, or a party to the action or special proceeding, while going to, remaining at, or returning from, the sitting where it is noticed for trial or hearing; and any other unlawful interference with the proceedings therein. The act of a person in advising and procuring the disobedience of the officers of

1290 Cunningham v. Hatch, 30 Abb. N. C. 31, 3 Misc. 101, 51 State Rep. 859, 23 Civ. Proc. R. (Browne) 82.

1291 Matter of Hess, 48 Hun, 586.

1292 Matter of Brick, 13 Daly, 312. It was held in matter of Radtke, 10 Daly, 119, decided before the statute, that contempt proceedings would not lie in such cases.

a corporation to a final judgment rendered against them and him which required the formal transfer of certain stock upon the books of the company is a contract within this subdivision.[1293] It is a contempt to interfere with property in the custody of the law or to bring a suit, without leave of court, affecting property in the custody of the law. So it is a contempt to wilfully interfere with the control of a committee over an habitual drunkard[1294] or to sue a lunatic, without leave, after the appointment of a committee,[1295] or to interfere with the possession of a receiver,[1296] or to sue a receiver, without permission,[1297] though it is not a contempt to issue an execution on a judgment recovered against a receiver, as such, and levy it on property held by him officially.[1298] Confession of judgment in another state, for the purpose of enabling creditors there to seize the property in possession of a receiver appointed in this state, is not a contempt of the court appointing him, but otherwise, it seems, where the person committing the alleged contempt, after voluntarily surrendering possession to the receiver, confesses judgment on fictitious claims with a view to preventing the receiver from exercising the rights with which he has clothed him.[1299] The preventing the service of process is a contempt hereunder[1300] as is the obtaining of papers from a witness, in order to defeat a subpoena to bring such papers before the court, though the guilty person does not know where the papers are,[1301] but the proprietor of a theatre has been held not guilty of contempt because of the enforcement by his employee of a rule forbidding strangers entering the theatre at the stage door, thereby excluding an officer who desired to serve process, where the proprietor had no knowledge of the occurrence at

1293 King v. Barnes, 113 N. Y. 476.
1294 Matter of Lynch, 5 Paige, 120.
1295 Matter of Hopper, 5 Paige, 489.
1296 Noe v. Gibson, 7 Paige, 513; Riggs v. Whitney, 15 Abb. Pr. 388; Sainberg v. Weinberg, 25 Misc. 327.
1297 Greene v. Odell, 43 App. Div. 608.
1298 Wilson v. Greig, 12 Wkly. Dig. 73.
1299 O'Callaghan v. Fraser, 37 Hun, 483.
1300 Conover v. Wood, 5 Abb. Pr. 84.
1301 Bonesteel v. Lynde, 8 How. Pr. 226.

the time.[1302] An act done to defeat an anticipated judgment, such as sending children out of the jurisdiction of the court[1303] or disposing of property[1304] is punishable as a contempt.[1305]

—— **(5) Refusal of witness to attend or testify.** Fifthly, the Code makes it a contempt for a person subpoenaed as a witness, to refuse or neglect to obey the subpoena, or to refuse or neglect to attend, or to be sworn, or to answer as a witness.[1306] Such an act, where "contumacious and unlawful," is a criminal contempt, and a refusal of a witness to answer may be punished either as a criminal or a civil contempt.[1307] Refusal to testify before a grand jury, or to answer a proper question, is also a contempt within this subdivision.[1308] The questions which the witness must answer, under penalty of being punished, must, of course, be questions proper to be asked on the examination of a witness, and a witness cannot be punished for a contempt for refusing to answer a question immaterial and irrelevant to the issue upon the trial whereof he is examined.[1309] A "written" order requiring an answer to questions put, served on the witness, is not a condition precedent,[1310] and a general refusal to testify is sufficient to warrant punishment, it not being

1302 People ex rel. Soc. for Prevention of Cruelty to Children v. Gilmore, 26 Hun, 1.

1303 People ex rel. Brooklyn Industrial School Ass'n v. Kearney, 21 How. Pr. 74.

1304 Greite v. Henricks, 71 Hun, 11, 53 State Rep. 852.

1305 A person may be held guilty of contempt for doing an act which the court by a decision awarding a writ of mandamus intends to prevent him from doing, although the act is performed before the proceedings have resulted in the actual issuance of such writ, where the decision has been announced and made known to the person charged with the contempt. People ex rel. Platt v. Rice, 144 N. Y. 249, 63 State Rep. 110.

1306 See, also, Code Civ. Proc. § 853.

1307 People ex rel. Jones v. Davidson, 35 Hun, 471.

1308 People ex rel. Hackley v. Kelly, 24 N. Y. 74; People ex rel. Phelps v. Fancher, 2 Hun, 226; Matter of Taylor, 8 Misc. 159, 60 State Rep. 136.

1309 Matter of Odell's Estate, 19 State Rep. 259.

1310 Lathrop v. Clapp, 40 N. Y. 328; Kendrick v. Wandall, 88 Hun, 518.

necessary that some particular question be addressed to the witness.[1311] Advice of counsel to refuse to answer is no defense,[1312] nor is it an excuse that the witness fees tendered were inadequate, where no such objection was raised at the time.[1313]

—— **(6) Improper acts of jurors.** The sixth ground applies to jurors. It is provided that if a person duly notified to attend as a juror, at a term of the court, improperly converses with a party to an action or special proceeding, to be tried at that term, or with any other person, in relation to the merits of that action or special proceeding, or receives a communication from any person, in relation to the merits of such an action or special proceeding, without immediately disclosing the same to the court, he is guilty of a contempt.

—— **(7) Disobedience by officer of inferior court.** The seventh ground applies to officers of inferior courts, it being a contempt for an inferior magistrate, or a judge or other officer of an inferior court, to proceed, contrary to law, in a cause or matter, which has been removed from his jurisdiction to the court inflicting the punishment, or to disobey a lawful order or other mandate of the latter court,

—— **(8) Common law grounds.** Eighthly and lastly, the common law grounds are adopted by authorizing punishment, in any other case, where an attachment or any other proceeding to punish for a contempt, has been usually adopted and practiced in a court of record, to enforce a civil remedy of a party to an action or special proceeding in that court, or to protect the right of a party.

§ 385. Particular Code provisions relating to contempts.

Although the Code enumerates the acts which may be punished for a criminal contempt under section 8 and for a civil contempt under section 14, nevertheless there are scattered throughout the Code numerous provisions authorizing pun-

1311 Clark v. Brooks, 26 How. Pr. 254.

1312 Heerdt v. Wetmore, 25 Super. Ct. (2 Rob.) 697; Reynolds v. Parkes, 2 Dem. Surr. 399.

1313 Andrews v. Andrews, 2 Johns. Cas. 109.

ishment for contempt in particular cases. Though these additional acts for which punishment may be imposed are not specifically stated to constitute a criminal or a civil contempt, yet the most of the provisions seem to relate to criminal contempts, while other acts specified may constitute both a criminal and a civil contempt. Among such acts are the following:

(1) Failure to pay costs of motion to strike out matter contained in a plea;[1314] (2) Disobedience to order requiring sheriff to return an inventory of goods attached;[1315] (3) Second application for order or judgment, with knowledge of previous application, to another judge or court;[1316] (4) Disobedience to order to appear for examination before trial;[1317] (5) Failure to appear, or to testify, or to subscribe deposition, where subpoenaed to testify for a deposition for use without the state;[1318] (6) Non-attendance or refusal to be sworn or to testify before a referee;[1319] (7) Violation of order restraining judgment debtor from committing waste on the property while in possession during the period allowed for redemption;[1320] (8) Disobedience of order directing payment of gross sum in lieu of dower;[1321] (9) Failure of sheriff to file return in replevin or omission to comply with notice to file return;[1322] (10) Disobedience of order to pay alimony;[1323] (11) Non-payment on demand of the costs awarded by a final order made in a special proceeding instituted by state writ, except where a peremptory writ of mandamus is awarded;[1324] (12) Failure to make return to writ of mandamus;[1325] (13) Omission to make a return as required by a writ of certiorari or by

[1314] Code Civ. Proc. § 545.
[1315] Code Civ. Proc. § 681.
[1316] Code Civ. Proc. § 778.
[1317] Code Civ. Proc. § 874.
[1318] Code Civ. Proc. § 920.
[1319] Code Civ. Proc. § 1018.
[1320] Code Civ. Proc. § 1444.
[1321] Code Civ. Proc. § 1618.
[1322] Code Civ. Proc. § 1716.
[1323] Code Civ. Proc. § 1773.
[1324] Code Civ. Proc. § 2007.
[1325] Code Civ. Proc. § 2073.

an order for a further return;[1326] (14) Neglect or refusal to obey an order made in the course of supplementary proceedings;[1327] (15) Disobedience to order requiring transferee of cause of action or other person interested, liable for costs, to order directing payment of such costs by said person.[1328] The above Code provisions will not be discussed in this chapter, but will be treated of in subsequent chapters relating to the particular order, writ, etc., disobeyed, or the proceedings in which the subject of the contempt occurs.

§ 386. Disobedience as ground for punishment.

Disobedience to a "mandate," where wilfull, has been seen to be a criminal contempt. Where not wilfull, but where it tends to defeat, impair, impede or prejudice a right or remedy of a party, we have seen it constitutes a civil contempt. The subdivision enumerating such act as a civil contempt also specifies as a contempt the non-payment "of a sum of money, ordered or adjudged by the court to be paid, in a case where by law execution cannot be awarded for the collection of such sum." This is supplemented by section 1241 of the Code which provides that refusal or neglect to obey a judgment may be enforced by contempt proceedings (1) where the judgment is final and cannot be enforced by execution; (2) where the judgment is final and part of it cannot be enforced by execution; (3) where the judgment is interlocutory and requires a party to do, or to refrain from doing, an act; (4) and where the judgment requires the payment of money into court, or to an officer of the court, except where the money is due on a contract, express or implied, or as damages for non-performance of a contract; and that where a judgment included under subdivision 4 is final it may be enforced by contempt proceedings either simultaneously with, or before or after the issuing of an execution thereon, as the court directs.[1329] That there must exist a mandate or judg-

1326 Code Civ. Proc. § 2135.
1327 Code Civ. Proc. § 2457.
1328 Code Civ. Proc. § 3247.
1329 Code Civ. Proc. § 1241.

ment, seems too plain for argument. Thus refusing to deliver property to a reeeiver cannot be punished as a contempt, unless an order of court so directs.[1330] Failure to produce books in compliance with a subpoena duces tecum issued by a judge is a contempt.[1331]

—— **Constructive disobedience.** The permitting, aiding or advising the breach of a mandate, order or judgment, also constitutes a contempt.[1332]

—— **Definiteness of order.** The mandate must be definite, in order that a disobedience constitute a contempt, since it is only reasonable that a person should not be punished for disobedience unless he knows the precise act or acts which he is required to do, or to refrain from doing.[1333] However, if the person knows all the particulars from other sources, he may be punished though the mandate is not as definite as it should be.[1334]

—— **Service and knowledge of order.** Whether personal service of the mandate or judgment is necessary, before punishment can be imposed for disobedience thereto, seems to depend on the nature of the mandate or judgment. As to injunctions the rule can be said to be settled that the service of the order is not essential to authorize punishment for disobedience where the person has knowledge of the order,[1335] especially where he

1330 McKelsey v. Lewis, 3 Abb. N. C. 61; Tinkey v. Langdon, 60 How. Pr. 180. Compare Moore v. Smith, 70 App. Div. 614, 74 N. Y. Supp. 1089, 74 App. Div. 629, 77 N. Y. Supp. 415; Krakower v. Lavelle, 37 Misc. 423; Holmes v. O'Regan, 68 App. Div. 318; Newell v. Hall, 74 App. Div. 278; Fletcher v. McKeon, 74 App. Div. 231; Coffin v. Burstein, 68 App. Div. 22.

1331 Holly Mfg. Co. v. Venner, 74 Hun, 458. Collection of authorities, see 3 Abb. Cyc. Dig. 704, 705. The question of what constitutes a disobedience, excuse therefor, etc., is discussed in a subsequent chapter.

1332 Wheeler v. Gilsey, 35 How. Pr. 139; Douglass v. Bush, 34 App. Div. 226.

1333 Ketchum v. Edwards, 153 N. Y. 534; Ross v. Butler, 57 Hun, 110.

1334 Byam v. Stevens, 4 Edw. Ch. 119.

1335 Gage v. Denbow, 49 Hun, 42; Koehler v. Farmers' & Traders' Nat. Bank, 53 Hun, 637, 6 N. Y. Supp. 470; People ex rel. King v. Barnes, 55 Hun, 605, 7 N. Y. Supp. 802, 28 State Rep. 624; Rochester Lamp Co. v. Brigham, 1 App. Div. 490.

has gone to another state and has there been served with the order.[1336] On the other hand, courts of law, especially in reference to writs issued under the common law, do not seem to have adopted the chancery rule that the mere knowledge of the person is sufficient on which to found a proceeding for contempt. Thus a party cannot be punished for failure to appear for examination before trial[1337] or for failure to comply with an order directing him to produce for inspection books and papers[1338] or for failure to comply with an order to pay alimony,[1339] until the order is "personally" served on him. This rule has been extended so as to make it necessary to serve a second order, as where a party was personally served with an order to be examined as a witness before trial and upon the return thereof a motion was made to dismiss the proceeding, the decision of which was reserved for some days, after which the application was denied and an order made requiring the party to appear upon a later day, pursuant to the preceding order, it was held that it was necessary to personally serve the second order on the party.[1340] The appellate division has, however, refused to follow the extreme rule applied in the case just cited and has held it unnecessary to serve an order reinstating a disobeyed order which has been served.[1341] The right to enforce certain judgments by punishment for contempt, as provided for by section 1241 of the Code, depends on the service of a certified copy thereof on the party against whom it is rendered or the officer or person who is required thereby, or by law, to obey it, and it has been held that the fact that a party is aware of such a judgment and that he has recognized its existence in various ways as by appealing from it, is not sufficient to overcome the want of service upon him, for, though he may be punished for vio-

1336 Davis v. Davis, 83 Hun, 500, 65 State Rep. 132.

1337 Tebo v. Baker, 77 N. Y. 33; Loop v. Gould, 17 Hun, 585.

1338 Matter of Smith's Estate, 15 State Rep. 733.

1339 Sandford v. Sandford, 40 Hun, 540.

Same rule applies to decree, Horslacher v. Horslacher, 1 Month. Law Bul. 73.

1340 McCaulay v. Palmer, 40 Hun, 38.

1341 Rochester Lamp Co. v. Brigham, 1 App. Div. 490, 72 State Rep. 467.

lating an order or judgment of which he has notice, he cannot be punished for failure to do something which he is commanded to do except in the manner specified in the statute.[1342] It is also held that a mere notice of judgment, without knowledge of the particulars, does not authorize punishment for disobedience.[1343]

—— **Demand as condition precedent.** A demand of performance is ordinarily a condition precedent[1344] and such demand cannot be made after service of the notice of motion.[1345] However, proof of personal service of an order of the court and an order to show cause why the party served should not be attached for contempt and disobedience, and that such party insultingly refused to receive the papers, and told the person presenting them to serve them on his attorney, is sufficient proof, under the statute, of a personal demand and refusal, to authorize the issue of an attachment.[1346] It has been held, though, that where the money is directed to be paid "into court" or to an officer selected by the court to receive it, a demand is not necessary.[1347] The demand must be made by, or on behalf of, the party to whom the money is to be paid or in whose favor the order or judgment is.[1348]

—— **Effect of disobedience to invalid order.** It is well established that if the mandate is "void," disobedience thereto is not a contempt, but that if the mandate is merely irregular or erroneous, it must be obeyed, the only remedy of the party being by a review of the mandate in a higher court.[1349] In other words, the validity of the mandate cannot be collaterally assailed, other than for want of jurisdiction, in a proceeding to punish its disobedience as a contempt. However, it is no sufficient excuse for the conduct of the parties, who have neglected or disobeyed an order of the court after appealing

1342 Pittsfield Nat. Bank v. Tailer, 23 Civ. Proc. R. (Browne) 48.

1343 Hilliker v. Hathorne, 18 Super. Ct. (5 Bosw.) 710.

1344 Delanoy v. Delanoy, 19 App. Div. 295; Gray v. Cook, 24 How. Pr. 432; Ryckman v. Ryckman, 32 Hun, 193.

1345 Amerman v. Amerman, 3 State Rep. 356.

1346 Graham v. Bleakie, 2 Daly, 55.

1347 Whitman v. Haines, 21 State Rep. 41.

1348 Matter of Gilman's Estate, 15 State Rep. 718.

1349 3 Abb. Cyc. Dig. 689 et seq.

from it and after stipulating to proceed in accordance with the decision of the appellate court, to say that there was no jurisdiction to make such an order. They cannot, therefore, raise the objection that the order was made at a special term when it could only have been made at a general term of the court, as a question relating to the authority of that branch of the court to make a particular order may be effectually waived.[1350] The question arises then as to what will render a mandate "void" and the answer is want of jurisdiction either of the subject matter or of the person affected thereby, and nothing else. It must be shown that in point of law, there was no mandate or order, and no disobedience, by showing that the court had no right to judge between the parties on the subject. The existence or non-existence of a good cause of action does not affect the jurisdiction,[1351] though it has been held that where the contempt is civil rather than criminal, there must exist not only jurisdiction in the court or officer granting the order which has been disobeyed, but also a valid cause of action in the aggrieved party.[1352] The reason for the discrimination is said to be that inasmuch as injury to a party is the basis of a civil contempt, there can be no injury where there is no right to maintain the suit. An order is void for want of jurisdiction where the affidavit to obtain the order for examination of a party before framing pleading, did not allege that the testimony of such party was necessary and material.[1353] So an order purporting to have been made without an opportunity having been afforded for hearing the party to be affected thereby, does not show on its face such jurisdiction as to found proceedings thereon for contempt for its disobedience.[1354]

——**Effect of reversal or dissolution of order.** Disobedience after the reversal or dissolution of an order is not a con-

1350 People ex rel. Platt v. Rice, 144 N. Y. 249.

1351 People ex rel. Davis v. Sturtevant, 9 N. Y. (5 Seld.) 263; Sheffield v. Cooper, 21 App. Div. 518.

1352 People ex rel. Gaynor v. McKane, 78 Hun, 154, 60 State Rep. 196.

1353 Matter of Gains, 15 Misc. 75, 72 State Rep. 262, 25 Civ. Prac. R. (Scott) 243.

1354 Perkins v. Taylor, 19 Abb. Pr. 146.

tempt[1355] and a reversal or dissolution precludes a commitment for disobedience while the order was in force,[1356] but the modification of the order on appeal will not justify its disobedience in a particular as to which it is not modified, pending the remittitur from the appellate court.[1357]

—— **Enforcement of "judgments."** Coming now to the Code provision previously set forth as to enforcement of judgments by contempt proceedings, it has been held that the enforcement of judgments in this manner is not a matter of absolute right but rests in the discretion of the court.[1358] The gist of this Code provision is that punishment for a contempt cannot be inflicted for disobeying a "final" judgment "in cases where an execution can issue," except where a judgment is embraced within subdivision 4. The question then arises as to what judgments may be enforced by execution. The Code enumerates the cases where a final judgment may be enforced by execution as including judgments for a sum of money or directing the payment of a sum of money, judgments for plaintiff in ejectment and for dower, and judgments in actions to recover a chattel where it awards a chattel to either party.[1359] Hence where a party is required to pay over an ascertained and specific sum, as distinguished from a specific or particular fund, the remedy is by execution and payment will not be enforced by contempt proceedings.[1360] Subdivision 3 has been applied where, on the reversal of a judgment under which moneys had been delivered to defendant by a depositary, the defendant was ordered to restore the same to the custody of the court, it being held that such order was an interlocutory order having for its object the preservation of the fund, and hence might be enforced by proceedings for contempt.[1361] Subdivision 4 applies only to

[1355] Gardner v. Gardner, 87 N. Y. 14.

[1356] Smith v. McQuade, 59 Hun, 374, 36 State Rep. 557; Moat v. Holbein, 2 Edw. Ch. 188.

[1357] People ex rel. Platt v. Rice, 144 N. Y. 249.

[1358] Cochrane's Ex'r v. Ingersoll, 73 N. Y. 613.

[1359] Code Civ. Proc. § 1240.

[1360] Matter of Hess, 48 Hun, 586, 16 State Rep. 255.

[1361] Devlin v. Hinman, 40 App. Div. 101, 29 Civ. Proc. R. (Kerr) 127.

cases where the judgment requires a deposit or payment of money "other than costs" given by a final judgment to a party or his attorney.[1362] An action for a breach of trust which arises out of contractual relations is nevertheless a tort and hence not within the exception in such subdivision embracing cases where money is due on contract.[1363] A receiver appointed by the judgment is an "officer of the court" within the subdivision.[1364]

§ 387. Excuses.

The excuses set up in contempt proceedings are many, but only some of the most common ones will be noticed. Perhaps the one most often urged to escape the penalty for disobeying an order is the excuse that the disobedience was because of the advice of counsel notwithstanding that it is well settled that the advice of counsel furnishes no excuse for disobeying an order.[1365] It is no excuse for noncompliance with an order requiring the president of a company to do an act that the co-operation of the other officers is necessary,[1366] but where the order served is not properly folioed, and it is returned in good faith, on advice of counsel, for want thereof, failure to obey the order is excused.[1367] A party who fails to appear pursuant to process requiring his attendance will not be punished for contempt, where his adversary also failed to appear on the appointed day.[1368]

——**Inability to comply with order.** Inability to comply with the order is another common excuse which is looked on more favorably. Whether inability to comply with the order will excuse disobedience seems to depend on whether the inability to pay is caused by the wrongful act of the person

1362 Noland v. Noland, 29 Hun, 630.

1363 Gildersleeve v. Lester, 68 Hun, 535.

1364 Gildersleeve v. Lester, 68 Hun, 535.

1365 Stubbs v. Ripley, 39 Hun, 620; Boon v. McGucken, 67 Hun, 251; New York Mail & Newspaper Transp. Co. v. Shea, 30 App. Div. 374. See, also, 3 Abb. Cyc. Dig. 678, 679.

1366 Kling v. Post, 12 State Rep. 575.

1367 Spafard v. Hogan, 22 Wkly. Dig. 519.

1368 Gardiner v. Peterson, 14 How. Pr. 513.

sought to be punished, where the debt is not fiduciary in its origin.[1369] If he is financially or otherwise unable to comply with the order, not resulting from his own wrong doing, he is not to be punished except where punishment is sought for failure to pay alimony. On the other hand, if he has purposely disabled himself to avoid compliance with the order[1370] or has embezzled or squandered the trust fund in his hands,[1371] he cannot thus escape liability.

——**Pendency of appeal from order disobeyed.** The pendency of an appeal does not constitute a defense except where there has been a stay of proceedings.[1372]

——**Short notice to witness.** The failure of a witness to attend a trial, pursuant to subpoena, should be excused upon slight grounds, if the notice given him be unreasonably short, though its shortness does not in itself excuse absence.[1373]

§ 388. Defenses.

The Code provides that if any loss or injury has occurred, and the case is not one where it is specially prescribed by law that an action may be maintained to recover damages for the loss or injury, a fine sufficient to indemnify the aggrieved party must be imposed.[1374] In construing this section it is held that it is not sufficient, to protect the party against punishment, for failure to pay over moneys pursuant to an order, to show that an action may on general principles be maintained for the same cause, but it must be shown to be a case where the law has specially prescribed an action as the means of redress.[1375] An attachment for contempt in failing to pay

1369 Matter of Ockershausen's Estate, 59 Hun, 200.

1370 Cochran v. Ingersoll, 13 Hun, 368.

1371 People ex rel. Lawyers' Surety Co. v. Anthony, 7 App. Div. 132; Estate of Battle, 13 Civ. Proc. R. (Browne) 27.

1372 Howe v. Searing, 19 Super. Ct. (6 Bosw.) 684; People ex rel. Day v. Bergen, 53 N. Y. 404; Pittsfield Nat. Bank v. Tailer, 50 State Rep. 415, 23 Civ. Proc. R. (Browne) 48; Power v. Village of Athens, 19 Hun, 165.

1373 Chalmers v. Melville, 1 E. D. Smith, 502; Smith v. Drury, 22 Wkly. Dig. 3. See, also, Gibbs v. Prindle, 9 App. Div. 29.

1374 Code Civ. Proc. § 2284.

1375 Matter of Morris, 45 Hun, 167, 10 State Rep. 50.

sheriff's fee will not be granted where it appeared that the sheriff had commenced an action to determine the questions involved as to liability for the payment of such charges.[1376]

§ 389. Persons liable.

A party, officer of court, witness, juror, or third person, may be punished for a contempt. Thus an agent or servant of the party ordered to do, or to refrain from doing, an act, may be punished.[1377] A corporation may be punished for contempt, through its officers or members.[1378] A female may also be punished,[1379] as may a nonresident.[1380] But a client cannot be punished as for contempt for his attorney's acts.[1381]

[1376] Hall v. United States Reflector Co., 4 Civ Proc. R. (Browne) 148, 66 How. Pr. 31.

[1377] Batterman v. Finn, 32 How. Pr. 501; Krom v. Hogan, 4 How. Pr. 225, 2 Code Rep. 144. In the former case it is said that in order to make a person who is not a party to the action or named in the injunction order, liable for disobeying such injunction, on the sole ground that he is an agent or servant, the person should bear such a relation to the party enjoined as will enable the latter to control the action of the person sought to be charged, in regard to the subject-matter as to which the injunction issues.

But an attorney should not be held guilty of contempt in prosecuting an action notwithstanding an injunction against the plaintiff, where he was not named in the order, nor was his name in the summons and complaint in the action in which it was made, and he denied knowledge of the injunction. Dinsmore v. Commercial Travelers' Ass'n, 38 State Rep. 624, 60 Hun, 576.

[1378] People v. Albany & V. R. Co., 12 Abb. Pr. 171, 20 How. Pr. 358; Davis v. City of New York, 8 Super. Ct. (1 Duer) 451.

[1379] Matter of Hahlin's Estate, 53 How. Pr. 501; People ex rel. Crouse v. Cowles, 4 Keyes, 38.

[1380] A court of this state having acquired jurisdiction of an action and issued an injunction therein, may punish its violation, although the parties are both nonresidents and part of the acts complained of were done without the state. Prince Mfg. Co. v. Prince's Metallic Paint Co., 51 Hun, 443, 20 State Rep. 923.

[1381] Harris v. Clark, 10 How. Pr. 415; Satterlee v. De Comeau, 30 Super. Ct. (7 Rob.) 666.

CHAPTER IV.

PLACE OF TRIAL.

§ 390. Scope of chapter.

This chapter will be confined to a consideration of the proper

county in which to bring an "action" in the "supreme court." The general Code provisions are not applicable to actions in any other court.[1] The practice relating to obtaining a change of the place of trial will be found in a subsequent chapter.

§ 391. History of the practice relating to venue.

The original object of the common law rule of pleading requiring the pleader to allege the place, that is, to lay the venue, to each affirmative traversable allegation, was to determine the place from which the venire facias should direct the jurors to be summoned in case the parties should put themselves upon the country, for, by the ancient practice, when juries were composed of persons cognizant of their knowledge of the fact in dispute, it was necessary to summon the jury from that venue (visne or vicini,—that is, neighborhood) which had been laid to the particular fact in issue, and from the venue of parish, town or hamlet as well as county. But at a very early time the practice in this respect was radically changed, so that the jurors began to be summoned no longer as witnesses cognizant of the fact of their own knowledge, but as judges to receive the fact from the testimony of others judicially examined before them. When this change had been effected, the reason for requiring them to be summoned from the immediate neighborhood where the fact occurred ceased to apply, and by virtue of the statute 16 & 17 Car. II. c. 8, the practice arose of having issues of fact tried, not by a jury summoned from the venue laid to the fact in issue, but by one summoned from the venue in the action.

——**Difference between "local" and "transitory" actions.** Before this change in the constitution of juries, the venue was always laid in the true place where the fact occurred, but when, in consequence of the change, the reason ceased to operate, a distinction arose between facts of which the place of occurrence was material, comprising all matters relating to realty and hardly any others, and facts of which the place was immaterial, and which might be supposed to happen any-

[1] Code Civ. Proc. § 991.

where. Facts of the former sort were appropriately designated as "local," while those of the latter sort were as properly denominated "transitory," and, accordingly, actions began to be classed as either local, being such wherein the principal facts on which it was founded were local, or transitory, in which any principal fact be of the transitory kind. And the rule arose that, in local actions, where the possession of land or damages affecting land were to be recovered, the plaintiff must declare his injury to have happened in the very county and place where it really did happen, that is, he must lay the venue truly, while in transitory actions, as debt, detinue and the like, the plaintiff need not lay the venue truly, but might declare in what county he pleased. It is evident, therefore, that as the issue was to be tried in the venue of the action, the plaintiff in a transitory action was enabled to have the issue tried in whatever county he pleased by simply alleging in his declaration that the fact occurred in such county, whether it really did or not. The distinction between transitory and local actions in no way depended upon the difference between equitable and common law jurisdiction.[2] Transitory actions being such as might have arisen in one place or county as well as another, included generally all personal actions whether ex contractu or ex delicto. At common law, it was the theory of transitory actions that they could be brought anywhere within the state. This has been changed by statutes which make the place of trial of a transitory action the place where the parties reside. So transitory actions are now transitory in the sense that they may be brought anywhere where the parties can be found, only in name. On the other hand, every action is so far transitory that the plaintiff may, with impunity, lay his venue in any county in the state. If the proper county has not been selected, the defendant has the right to have the place of trial changed.[3]

—— **Change of venue.** In this state of the law, about the reign of James I., the courts, conceiving themselves empow-

[2] Atlantic & Pac. Telegraph Co. v. Baltimore & O. R. Co., 46 Super. Ct. (14 J. & S.) 377.

[3] Houck v. Lasher, 17 How. Pr. 520.

ered, as it is said, so to do by the statutes, 6 Rich. II. c. 2, and 4 Hen. IV. c. 18, began a practice by which defendants were enabled to protect themselves from inconvenience resulting from the venue being laid contrary to the fact, and enforce, if they wished, a compliance with the stricter and more ancient system. By this practice, if the plaintiff in a transitory action laid a false venue, the defendant might make an affidavit that the cause of action, if any, arose, not in that, but in another, county, and, upon such affidavit, might move the court to have the venue changed to the proper county. Such motion the court usually granted, and obliged the plaintiff to amend his declaration in this particular, unless he, on the other hand, would undertake to give at the trial some material evidence arising in the county where he had laid the venue. Sometimes, also, the courts would order a change of venue, even from the proper jurisdiction, upon a showing that a fair and impartial trial could not be had therein, but the change of venue was a matter which rested largely within the discretionary power of the court, which was exercised according to the circumstances of the case to promote the interests of justice.[4]

§ 392. History of the statutes—Revised Statutes.

The Revised Statutes provided that "(1) actions for the recovery of any real estate, or for the recovery of possession of real estate, actions for trespass on land, and actions for trespass on the case for injuries to real estate, shall be tried in the county where the subject of the action shall be situated: (2) actions of trespass for injuries to the person; and actions on the case for injuries to the person, or personal property; shall be tried in the county where the cause of action arose: (3) actions for slander, for libels, and all other actions for wrongs, and upon contracts, shall be tried in the county where the venue shall be laid, unless the court shall deem it necessary for the convenience of parties and their witnesses, or for the purposes of a fair and impartial trial, to order such

[4] 3 Bl. Comm. 294; Steph. Pl. 275; Vander Zee v. Van Dyck, 1 Cow. 600.

issues to be tried in some other county; in which case, the same shall be tried in the county so designated. And the court shall have power to change the venue in any of the actions specified in this section, when it shall appear that a fair and impartial trial cannot be had in the county in which such venue is laid. In suits against public officers, or against any person specially appointed to execute the duties of such officers, for any act done by them by virtue of their offices respectively, and in suits against other persons, who, by the commandment of such officers, or in their aid or assistance, do any thing touching the duties of such office, which are required by law to be laid in the county where the fact happened, if it shall not appear on the trial, that the cause of such action arose within the county where such trial is had, the jury shall be discharged, and judgment of discontinuance shall be rendered against the plaintiff."[5]

—— **Old Code provisions.** The provisions of the old Code were very similar to those of the present Code. The language used in enumerating the actions required to be brought in the county in which the subject of the action or some part thereof, is situated, was not quite as specific or as comprehensive as the language used in the present Code, but covered practically the same actions and in addition an action for the recovery of personal property, distrained for any cause. Such an action is now triable in the county where the cause of action, or some part thereof, arose. Section 123 of the Code of Procedure, required that an action for the recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, "and for injuries to real property," must be tried in the county in which the subject of the action or some part thereof was situate. Section 982 of the Code of Civil Procedure omits the language "and for injuries to real property," and instead thereof provides "and every other action to recover, or to procure a judgment, establishing, determining, defining, forfeiting, annulling, or otherwise affecting, an estate, right, title, lien, or other interest in real property, or a chattel real," shall be

[5] 2 Rev. St. p. 409.

tried in the county in which the subject of the action is situated. The other provisions were about the same as the provisions of the present Code.[6]

The old Code changed the word "venue" to "place of trial." In commenting thereon it has been said that it is "unfortunate that the commissioners who devised our present system of practice should have thought it expedient, in so many instances, to have submitted new terms and forms of expression to indicate the same thing which existed under the former system. The word 'venue' was well adapted to designate the county where the action was to be tried. Its meaning was well understood. No other single word can be made to express the same thing. I never could understand why it should have been so carefully excluded from the diction of the Code. It has not been done without considerable pains, as is evident from the various phrases to which the codifiers have found themselves compelled to resort for the want of any other single word to express the same thing. Sometimes it is called 'the place of trial,' sometimes 'the proper county;' again, 'the county where the action must be tried;' and yet again, 'the county in which the plaintiff desires the trial to be had.'"[7] The term venue is sometimes used as synonymous with the place of trial to be designated in the complaint, and in contradistinction to the place of trial with reference to the convenience of witnesses, etc.[8]

—— **New Code provisions.** Under the present Code, before the place of trial of an expected action is decided on, it should be determined whether the action relates to real property within section 982 of the Code so that it must be tried in the county in which the land is situated; or whether it is within section 983 so that it must be tried in the county where the cause of action, or some part thereof, arose; or whether it is an action not specified in section 982 or 983, in which case it must be tried in the county in which one of the parties reside at the commencement of the action. So it is seen that

[6] Provisions of old Code, see Code Civ. Proc. §§ 123-126.
[7] Bangs v. Selden, 13 How. Pr. 374.
[8] Vermont Cent. R. Co. v. Northern R. Co., 6 How. Pr. 106.

the place of trial depends first on the nature of the action and secondly on either the location of the subject matter of the action, the place where the cause of action arose, or the place where a party resides, according to the nature of the action. The first two classes of actions correspond to what was known at common law as local actions while the third class which embraces all actions not mentioned in the first two classes, corresponds to the common law transitory actions.

In this connection, however, it should be noted that the place of trial of any litigation arising under a contract may be controlled by a specific stipulation in the contract,[9] and that the statute as to place of trial applies only to causes of action arising within the state.[10] The territory annexed to the county of New York by statute in 1895 is a part of that county for the purpose of determining the place of trial of a legal action.[11]

§ 393. Place of trial as governed by location of "subject of action."

The Code provides that certain actions must be tried in the county in which "the subject of the action or some part thereof," is situated, except where all the real property to which the action relates, is situated without the state.[12] These actions were called local actions at common law and such name still clings to them. The "subject of an action," as that phrase is used, is that which is to be directly affected, in case the relief demanded by the plaintiff is granted, as in an action of ejectment, the land described in the complaint.[13] "Subject of the action" is synonymous with "subject matter of the action." As has been already stated, Pomeroy says that the "subject matter of the action" describes the physical facts,

[9] Greve v. Aetna Live Stock Ins. Co., 81 Hun, 28, 62 State Rep. 566, 1 Ann. Cas. 14; Benson v. Eastern Building & Loan Ass'n, 67 App. Div. 319.

[10] Smith v. Bull, 17 Wend. 323; Barney v. Burnstenbinder, 64 Barb. 212.

[11] Hawkins v. Pelham Electric Light & Power Co., 158 N. Y. 417.

[12] Code Civ. Proc. § 982.

[13] Horne v. City of Buffalo, 17 State Rep. 212.

and hence real and personal, money, lands, chattels and the like in relation to which the subject is prosecuted.[14]

This Code provision applies to equitable as well as legal actions.[15] The object of the section is to determine the venue in the classes of actions to which it refers, and it does not profess to limit or define the jurisdiction of the court. It cannot be implied from it that where, in the actions enumerated, the subject of the controversy does not lie in some county in this state, no action whatever will lie.[16]

An action is none the less local because the conveyance of real property, the situation of which renders it local, includes personal property in the county in which plaintiff sues.[17]

The Code enumerates nine classes of actions the place of trial of which is to be governed by the location of the subject of the action. These will now be considered in the order enumerated in the Code.

—— **(1) Ejectment.** An action of ejectment must be brought in the county where the land is situated, and it is immaterial in so far as the place of trial is concerned, that the complaint omits to ask for possession.[18] But an action to rescind a contract for the purchase of land on the ground of fraud is not an action for the recovery of real property.[19]

—— **(2) Partition.** An action for the partition of real property must be brought in the county where the property, or some part thereof, is located.

—— **(3) Action for dower.** An action for dower must be brought in the county in which the land in which a dower interest is sought, is located.

—— **(4) Foreclosure suits.** An action to foreclose a mort-

[14] Pom. Code Rem. p. 535.

[15] Litchfield v. International Paper Co., 41 App. Div. 446, 29 Civ. Proc. R. (Kerr) 357; Bush v. Treadwell, 11 Abb. Pr., N. S., 27.

[16] Newton v. Bronson, 13 N. Y. (3 Kern.) 587; Mussina v. Belden, 6 Abb. Pr. 165. These decisions are now embodied in the provision that the place of trial of actions relating to real property without the state is governed by the residence of the parties.

[17] Acker v. Leland, 96 N. Y. 383.

[18] Ring v. McCoun, 5 Super. Ct. (3 Sandf.) 524; Wood v. Hollister, 3 Abb. Pr. 14.

[19] Ely v. Lowenstein, 9 Abb. Pr., N. S., 42.

gage upon real property or upon a chattel real, must be brought in the county where the mortgaged premises are situated,[20] but an action to set aside a statutory foreclosure of a mortgage of real property and to redeem the land from the mortgage, is not local,[21] though an action to establish and enforce a lien on the surplus resulting from a foreclosure sale is local, since the surplus is to be regarded as realty.[22]

—— **(5) Action to quiet title.** An action to compel the determination of a claim to real property, as defined by section 1638 of the Code, must be brought in the county where the land is located. This action is one brought by a person who has been in possession of real property for a year or more, to compel the determination of any claim adverse to that of the plaintiff which the defendant makes to any estate or interest in the property.

—— **(6) Action for waste.** An action for waste must be brought in the county in which the land is situated.

—— **(7) Action for a nuisance.** An action for a nuisance, is a local action. It has been held in an action to abate a nuisance in polluting a river, that the county in which the foul substances are deposited in the river, and not the one where the nuisance results, is the proper place of trial, since the "subject of action" is the object or structure mentioned and alleged to have been unlawfully constructed or erected, or the action, practice, or doings of the defendant, which are charged to be illegal and are stated in the complaint as the foundation for the relief demanded.[23]

—— **(8) Action to compel a conveyance of real property.** An action to procure a judgment directing a conveyance of real property, is to be commenced where the land is located.[24] This includes an action to compel specific performance of a contract for the sale or exchange of lands. If specific performance of a contract to exchange lands situated in differ-

20 Miller v. Hull, 3 How. Pr. 325.

21 Hubbell v. Sibley, 4 Abb. Pr., N. S., 403.

22 Fliess v. Buckley, 22 Hun, 551.

23 Horne v. City of Buffalo, 15 Civ. Proc. R. (Browne) 81, 17 State Rep. 212, 49 Hun, 76.

24 Compare Turner v. Walker, 70 App. Div. 306.

ent counties is sought, the proper place of trial is the county in which the lands of defendant are situated.[25] On the other hand, an action by a vendee against his vendor based on the vendor's agreement to accept a re-conveyance and re-pay the purchase price if the vendee could not sell the property within three years at a specified sum, is not an action to procure a judgment directing a conveyance of real property.[26]

—— **(9) Miscellaneous actions.** Every other action to recover or to procure a judgment establishing, determining, defining, forfeiting, annulling or otherwise affecting an estate, right, title, lien or other interest in real property or a chattel real, must be brought where the real property is situated. This last subdivision has been the subject of much legal controversy because of its general terms. The courts have liberally construed it and evinced no disposition to restrict its meaning or effect. This portion of the Code appears to relate to two classes of suits, and two only—first, actions to "recover" an estate, right, title, lien or other interest in real property or a chattel real; and, secondly, actions to "procure a judgment" affecting such an estate, right, title, lien or other interest. The expression "to procure a judgment," indicates that the actions to which it refers are only those in which the judgment which is sought is one that by its very terms, or by reason of its form and by virtue of the express provisions therein contained, will affect the title to real property or some interest therein. It does not apply to an action at law to recover damages for the breach of a contract, although that contract relates to real property, and the breach is alleged to be due to the inability of the defendant to give the plaintiff a good title; for in such a case the judgment which the plaintiff seeks to procure is a simple money judgment, and by no means a judgment in form affecting the title to real property.[27] So the mere fact that a question of the title to real estate may have to be passed upon in a suit does not bring it within this sub-

[25] Kearr v. Bartlett, 47 Hun, 245, 13 State Rep. 580, 28 Wkly. Dig. 112.
[26] Maier v. Rebstock, 68 App. Div. 481.
[27] Hogg v. Mack, 53 Hun, 463, 25 State Rep. 374, 17 Civ. Proc. R. (Browne) 338.

division so as to make it imperative that the case be tried in the county where the land is situated.[28]

It has been questioned whether the language of the present Code includes an action of trespass, but the weight of authority is that it falls within the provisions of this section.[29]

The courts have held that actions embraced in this subdivision are, inter alia, an action for damages for injuries to real property by defendant's negligence;[30] an action to enjoin an erection which would injure plaintiff's premises;[31] an action to set aside real estate mortgages as void;[32] an action to set aside, as fraudulent, a general assignment, which passes title, inter alia, to real estate situated in New York;[33] an action by a receiver of a judgment debtor to reach the debtor's interest acquired by will in his father's estate, consisting of real and personal property situated in the city of New York, and to set aside a transfer thereof to defendant in fraud of creditors;[34] an action brought by a citizen to annul the grant of a right of way to a railroad corporation;[35] an action to have the title to land declared to be in plaintiffs, on the ground that defendant's deed is a mortgage;[36] an action to subject real property of a testator to secret trusts;[36a] and an action to procure a judgment that a conveyance of land by defendant

[28] Hogg v. Mack, 53 Hun, 463.

[29] Litchfield v. International Paper Co., 41 App. Div. 446; Easton v. Booth, 19 Wkly. Dig. 552; Freeman v. Thomson, 50 Hun, 340, 20 State Rep. 194, 16 Civ. Proc. R. (Browne) 186; Dexter v. Alfred, 35 State Rep. 489; Rothlein v. Hewitt, 29 Misc. 664. Contra,—Polley v. Wilkisson, 5 Civ. Proc. R. (Browne) 135, 141.

[30] Mott v. Coddington, 24 Super. Ct. (1 Rob.) 267, 1 Abb. Pr., N. S., 290.

[31] Leland v. Hathorn, 42 N. Y. 547; Litchfield v. International Paper Co., 41 App. Div. 446, 29 Civ. Proc. R. (Kerr) 357.

[32] Brower v. Huested, 44 State Rep. 746.

[33] Acker v. Leland, 96 N. Y. 383; Wyatt v. Brooks, 42 Hun, 502, 4 State Rep. 441, 25 Wkly. Dig. 281; Moss v. Gilbert, 18 Abb. N. C. 202; Iron Nat. Bank of Plattsburgh v. Dolge, 46 App. Div. 327.

[34] Thompson v. Heidenrich, 66 How. Pr. 391.

[35] Sherman v. Adirondack Ry. Co., 92 Hun, 39, 71 State Rep. 746.

[36] Bush v. Treadwell, 11 Abb. Pr., N. S., 27.

[36a] Harmon v. Van Ness, 56 App. Div. 160.

was fraudulent and that he holds the land in trust for plaintiff.[37]

On the other hand, an action to have an "extinguished" mortgage declared fraudulent for the purpose of reaching the proceeds in the hands of the mortgagee, does not involve title to land.[38] Another illustration of an action not within the subsection, is an action to recover a part of the purchase price of land on the ground that the premises did not contain as many acres as defendant claimed, where the title is not in dispute, since in such case, the action is not one to "determine a claim" to real property.[39] Likewise, an action by a vendee against his vendor based on the vendor's agreement to accept a re-conveyance and re-pay the purchase price if the vendee could not sell the property within three years at a specified sum, is not an action to determine a claim affecting real estate.[40] And an action for a partnership accounting and distribution of assets, is not an action for the determination of the title to, or interest in, real property, merely because it includes a demand for judgment declaring that a lease taken in the name of the surviving partner is partnership assets.[41]

An action to recover on town bonds issued in aid of a railroad is not an action to "establish a lien" on real estate, since the lien is created upon the issuance of the bonds.[42]

As illustrating an action which does not "affect" a lien on real property, it is held that an action by the owner of a junior mortgage to compel the owner of the prior mortgage to assign his security to plaintiff on payment by him of the amount secured thereby, does not affect such a lien, since the lien remains the same and the only consequence of a judgment for plaintiff would be to change the ownership of the lien,[43] nor does an

[37] Starks v. Bates, 12 How. Pr. 465; Wood v. Hollister, 3 Abb. Pr. 14; Mairs v. Remsen, 3 Code R. 138.

[38] Fletcher v. Cooper, 59 How. Pr. 373.

[39] Oakes v. De Lancey, 35 State Rep. 775. See, also, Hogg v. Mack, 53 Hun, 463.

[40] Maier v. Rebstock, 68 App. Div. 481.

[41] Simpson v. Simpson, 41 App. Div. 449.

[42] Becker v. Town of Cherry Creek, 70 Hun, 6, 53 State Rep. 555.

[43] Yates County Nat. Bank of Penn Yan v. Blake, 43 Hun, 162, 5 State Rep. 486, 25 Wkly. Dig. 551.

action to restrain the delivery of a satisfaction piece of a judgment merely because, if plaintiff succeeds, the judgment will be a lien on defendant's real estate,[44] but an action to set aside an assignment of a judgment which was a lien on real estate owned by the assignee and to restore the lien, does affect a lien on real property.[45] So, an action to protect the water running upon plaintiff's lands, and restrain defendants from diverting the waters from their ancient and accustomed channel, although incident to his freehold interest, is not an action "affecting an interest" in the realty,[46] and an action to recover a dividend upon a certificate issued by a trustee who held title to certain real property, showing that the holder was entitled to an interest therein and a share of the rents and profits, the defense being payment, does not affect an interest in land.[47]

§ 394. Place of trial as governed by place where cause of action arose.

Certain actions must be tried in the county where the cause of action, or some part thereof, arose.[48] It is often a difficult question to determine where the cause of action arises. On a breach of the terms of a contract the place where the contract was to be performed, and the breach took place, is the place where the cause of action arises.[49] As has already been stated, Pomeroy defines a "cause of action" as the primary rights possessed by plaintiff and the corresponding primary duty devolving on defendant together with the delict or wrong.[50] So it would seem that the cause of action ordinarily arises in the county where the wrong is committed.

The Code divides these actions into three groups which will now be considered.

[44] Knickerbocker Life Ins. Co. v. Clark, 22 Hun, 506.

[45] Mahoney v. Mahoney, 70 Hun, 78, 53 State Rep. 444.

[46] Thompson v. Attica Water Co., 1 Civ. Proc. R. (McCarty) 368.

[47] Roche v. Marvin, 92 N. Y. 398.

[48] Code Civ. Proc. § 983. For note on the question as to what is the place where the cause of action arose, see 28 Abb. N. C. 435.

[49] Horne v. City of Buffalo, 15 Civ. Proc. R. (Browne) 81; Knowles v. City of New York, 71 App. Div. 410.

[50] Pom. Code Rem. p. 512.

—— **(1) Action for penalty or forfeiture.** An action to recover a penalty or forfeiture imposed by statute must be tried where the cause of action arose, except that where the offense was committed on water situated in two or more counties, the action may be tried in any county bordering on the water and opposite to the place where the offense was committed. There is one exception, however, in that in an action where the people of the state are a party to recover a penalty for trespass on the lands of the forest preserve, the action may be tried in a county adjoining the county where the cause of action arose.[51]

This provision in regard to penalties is confined to actions to recover a penalty or forfeiture "imposed by statute," and does not apply where the action is on a contract obligation to recover the penalty imposed by the instrument.[52]

An action to "recover" a statutory penalty or forfeiture should be distinguished from an action in the nature of a quo warranto, which latter action need not be tried where the cause of action arose and it is immaterial that the complaint in such an action also prays the imposition of a fine on defendant, since such an action is to "declare" rather than "recover" a forfeiture.[53]

Among the actions for a penalty which must be tried where the cause of action, or a part thereof, arose, within this section, are an action against a witness for a penalty in disobeying a subpoena;[54] and an action against the agents of a foreign insurance company to recover the statutory penalty for effecting insurance without complying with the requirements of the statute.[55, 56] On the other hand, an action to recover the excess of interest, and collateral securities, received in violation of the statute in relation to usury, is

[51] L. 1896, c. 376, § 29 provides, however, that actions for a penalty for having possession of milk cans belonging to another, may be brought where the owner, dealer or shipper resides. See Warner v. Palmer, 66 App. Div. 127.

[52] Lyman v. Gramercy Club, 28 App. Div. 30.

[53] People v. Platt, 46 Hun, 394, 12 State Rep. 409, 27 Wkly. Dig. 497.

[54] Cogswell v. Meech, 12 Wend. 147; Wilkie v. Chadwick, 13 Wend. 49.

[55, 56] Ithaca Fire Dep't v. Beecher, 99 N. Y. 429.

not an action to recover penalties,[57] nor is an action by a stockholder against an officer of the corporation for damages sustained by reason of a false annual report which induced plaintiff to become a stockholder.[58]

Laws 1886, chap. 194, § 1, provides that an action to recover a penalty for violation of the fish and game laws may be brought in any county of the state. Previous to 1886 the law was that such actions could be brought only in the county where the penalty was incurred or in an adjoining county.[59] Such provision must, however, be construed in connection with the general provision that an action for the recovery of penalties must be brought in the county where the cause of action, or some part thereof, arose.[60] Laws of 1888 provide that suits for penalties under the fish and game laws may be commenced in his own county by the district attorney of a county adjoining that in which such penalties were incurred.[61]

—— **(2) Action against public officer.** An action against a public officer or a person specially appointed to execute his duties for an act done in virtue of his office or for an omission to perform a duty incident to his office, or an action against a person who by the command or in the aid of a public officer has done anything touching his duties, must be brought where the cause of action arose. The Revised Statutes and the old Code, as originally enacted, omitted the words "or for an omission to perform a duty incident to his office,"[62] and it was held thereunder that actions against a public officer were local only where they related to official affirmative acts and not to omissions of duty,[63] and that the provision did not apply to

57 Wheelock v. Lee, 15 Abb. Pr., N. S., 24.

58 Hutchinson v. Young, 80 App. Div. 246, 80 N. Y. Supp. 259.

59 L. 1879, c. 534; Leonard v. Ehrich, 40 Hun, 460. The contrary was held in Veeder v. Baker, 83 N. Y. 156, and Taylor v. Attrill, 31 Hun, 132, but those cases were decided before the amendment of 1892 to section 31 of the stock corporation law, which makes the officers signing a false report liable for "the amount of damage sustained by such stockholder" instead of "for all the debts of the company."

60 People v. Wells, 14 State Rep. 647.

61 L. 1888, c. 577, § 3; People v. Rouse, 39 State Rep. 656.

62 Code Civ. Proc. § 124.

63 Elliot v. Cronk's Adm'rs, 13 Wend. 35; Hopkins v. Haywood, Id. 265; Wilson v. Jenkins, 1 Edm. Sel. Cas. 384.

an act of such a nature that his office gave him no authority to do it.[64] As to what constitutes an omission within the present statute, it is held that an omission by defendant to take the oath of office cannot be regarded an omission to perform a duty incident to the office, but rather an omission to perform an act required by law, to entitle him to enter upon the duties of such office, and may be regarded somewhat in the nature of a condition precedent to his right to perform any duty, as such officer, under the appointment.[65] It was also held, under the Revised Statutes, that the provision did not apply to writs of inquiry, but only to trials.[66] The present provision applies to an action for acts done as a public officer, though at the time of the action the defendant is not occupying the office.[67] It is not now a question of good or bad faith. The statute covers not only cases of neglect or inefficiency, but where in doing an act within the limits or scope of his authority, the officer exercises such authority improperly or abuses the confidence which the law reposes in him, he is still entitled to the protection of the statute.[68] Even allegations of malice and "wicked combination" will not deprive a public officer of the protection of such statute.[69] But the liability must be official rather than personal, and hence an action by an attorney against public officers for services is not within the section.[70]

A public officer cannot be deprived of his right to a trial in the county where the cause of action arose by the joinder of other defendants.[71] The right is an absolute one.

As examples of actions against a public officer which must be tried where the cause of action arose, may be mentioned an action against a public officer for false imprisonment;[72] an

64 Brown v. Smith, 24 Barb. 419.
65 People v. Platt, 10 State Rep. 577.
66 Love v. Humphrey, 9 Wend. 500.
67 People v. Tweed, 13 Abb. Pr., N. S., 419.
68 People v. Kingsley, 8 Hun, 233.
69 Row v. Sherwood, 6 Johns. 109.
70 Benn v. Owen, 6 Wkly. Dig. 125.
71 People v. Kingsley, 8 Hun, 233; Lamson Consolidated Store Service Co. v. Hart, 23 State Rep. 594.
72 The warden of a prison is a public officer. Cowen v. Quinn, 13 Hun, 344.

action against a sheriff for an escape;[73] an action against highway commissioners based upon their neglect to take proceedings to pay plaintiff's claim for services to their predecessors;[74] an action for libel against a trustee of schools in communicating to the newspapers testimony in proceedings against the principal of the school for misconduct;[75] and an action against a tax collector for a seizure under a tax warrant against another than plaintiff.[76] So a public officer, such as a commissioner to lay out a road, sued for an act done by virtue of his office, is entitled to have the action tried in the county where the cause of action arose, even though the action is brought by the people.[77] Likewise, in an action against a sheriff and attaching creditors and claimants of the property attached, where the relief sought is that the conflicting claims of the defendants may be made the subject of an interpleader between them, the action is against the sheriff in his official capacity so that the place of trial should be changed on his motion to the county where the cause of action, or some part thereof, arose, notwithstanding no personal claim is made against him.[78] So water and sewerage commissioners are public officers within this section.[79]

So is a chief of police of a city so that where an arrest is made in Canada pursuant to a telegram from the chief of police of Buffalo, an action for false imprisonment must be tried in Erie county. Tupper v. Morin, 25 Abb. N. C. 398.

So is a deputy sheriff, and he may be sued where the arrest was made, though the imprisonment was in another county. Ellis v. Baker, 62 App. Div. 542.

The same rule applies where the action is against a magistrate. Perry v. Mitchell, 5 Denio, 537.

A justice of the peace sued in another county for a wrongful arrest under acts done in the county of his residence, may obtain a change of venue to the county of his residence. Hankins v. Hanford, 61 App. Div. 341.

[73] Roach v. Odell, 18 Wkly. Dig. 204.

[74] Such action is triable in the county where the commissioners hold office. Clute v. Robinson, 21 Wkly. Dig. 120.

[75] Galligan v. Hornthal, 71 Hun, 18, 53 State Rep. 855, 23 Civ. Proc. R. (Browne) 201.

[76] Murphy v. Callan, 69 App. Div. 413.

[77] People v. Hayes, 7 How. Pr. 248.

[78] Wintjen v. Verges, 10 Hun, 576.

[79] People v. Kingsley, 8 Hun, 233, per Barrett, J.

—— **(3) Action to recover chattel.** An action to recover a chattel distrained or damages for distraining the chattel, must be brought where the cause of action arose.

Originally, at common law, all actions of replevin were local.[80] By the Revised Statutes, a very material change was made in this respect. The action was allowed for the wrongful taking, distraining, or detention of goods and chattels, and it might be laid and brought in like manner as actions for injuries to personal property, except where the action was brought for property "distrained" for any cause, when it had to be laid in the county where the distress was made,[81] a provision substantially retained by section 123 of the old Code, which enumerated as among the actions which must be tried in the county in which the subject of the action or some part thereof is situated, an action for the recovery of personal property "distrained for any cause." The old Code made no specific provision as to an action for damages for distraining a chattel. Thus it is seen that the present Code introduces a new rule in respect to this class of actions.

It will be observed that this section does not provide generally that an action to recover a chattel must be brought in the county where the cause of action arose, but it is an action to recover a chattel "distrained." Blackstone says that a distress is the taking of beasts or other personal property by way of pledge to enforce the performance of something due from the party distrained upon.[82] It is generally resorted to for the purpose of enforcing the payment of rent, taxes, or other duties, as well as to exact compensation for such damages as result from the trespasses of cattle.[83] It was at one time generally in vogue in the United States, but is now generally abolished, the remedy of attachment taking its place.[84] As to what constitutes the distraining of a chattel within this section, it has been held that a mortgagee's wrongful seizure of mortgaged chattels before default in the mortgaged debt is not a

[80] Atkinson v. Holcomb, 4 Cow. 45; Williams v. Welch, 5 Wend. 290.
[81] 2 Rev. St. p. 523, §§ 1, 3.
[82] 3 Bl. Comm. 231, 6.
[83] Cyc. Law Dict. p. 288.
[84] Cyc. Law Dict. p. 288.

"distress,"[85] and that a chattel is not distrained where defendant claims to be owner thereof by reason of an assignment to him for the benefit of creditors.[86] It has been said that the provisions of the statute only refer to the proceeding of distress as it existed at common law, by which a party might take and hold the personal property of another as a pledge or security for the payment of debt, or the discharge of some duty or reparation for an injury done, with the right in certain cases to sell it to obtain satisfaction.[87]

§ 395. **Place of trial as governed by residence of parties.**

An action not embraced in the list of actions already stated must be tried in the county in which one of the parties resided at the commencement thereof.[88] This means the residence of the parties to the record and not the residence of the real parties in interest.[89] And a person who is one of a class for whose benefit an action has been brought, but who has not been named or made a party, is not a party within the rule that a transitory action shall be commenced in the county where some of the parties reside.[90]

We will call these actions transitory actions. Actions upon contract have always been regarded as transitory, and are equally so whether they relate to real or personal property.[91] Hence, a cause of action for breach of a covenant to convey real property, is transitory.[92] An action for use and occupation, is transitory,[93] as is an action on a bond given to discharge a mechanic's lien, the place of trial not being controlled by the situs of the property affected by the lien.[94] So is an action to

[85] Boyd v. Howden, 3 Daly, 455.
[86] Ackerman v. Delude, 29 Hun, 137.
[87] Boyd v. Howden, 3 Daly, 455.
[88] Code Civ. Proc. § 984.
[89] Lane v. Bochlowitz, 77 App. Div. 171. Hart v. Oatman, 1 Barb. 229, is overruled.
[90] Brown v. Bache, 66 App. Div. 367.
[91] Mott v. Coddington, 24 Super. Ct. (1 Rob.) 267.
[92] Mott v. Coddington, 24 Super. Ct. (1 Rob.) 267, 1 Abb. Pr., N. S., 290.
[93] Corporation of New York v. Dawson, 2 Johns. Cas. 335; Low v. Hallett, 2 Caines, 374, Col. & C. Cas. 417; Bracket v. Alvord, 5 Cow. 18.
[94] Nims v. Merritt, 29 Misc. 58.

recover damages to goods because of the negligence of defendant, though damages are also sought for injury to real estate.[95] Likewise, an action for personal injuries, except in so far as specially regulated by statute, is transitory.[96]

An application for a mandamus against the state superintendent of banking whose office is at the capitol in Albany, must be made in that or in an adjoining county.[97]

The statutes formerly provided that an action against the city of New York must be brought in that city and county,[98] but such statutes have been held unconstitutional.[99]

—— **Residence vs. domicile.** In this class of actions, the place of trial is to be determined by the "residence" and not the "domicile" of the parties.[100] A distinction is taken between actual and legal residence, the latter being generally equivalent to a domicile. A legal residence or domicile is defined to

[95] Barney v. Burnstenbinder, 64 Barb. 212.

[96] McIvor v. McCabe, 16 Abb. Pr. 319, 26 How. Pr. 257; Hull v. Vreeland, 42 Barb. 543, 18 Abb. Pr. 182.

[97] People ex rel. Shook v. Kilburn, 28 Misc. 679.

[98] L. 1868, c. 853, § 8; City of Brooklyn v. City of New York, 25 Hun, 612.

[99] Mussen v. Ausable Granite Works, 63 Hun, 367.

[100] Lyon v. Lyon, 30 Hun, 455; Cincinnati, H. & D. R. Co. v. Ives, 21 State Rep. 67; Stacom v. Moon, 13 Wkly. Dig. 348.

In the first cited case, it was held that the wife's actual residence will give her a right to fix the place of trial, in her action against her husband, notwithstanding the marital domicile was elsewhere, especially if she has been justified in making a change of domicile.

In the second case, an unmarried man, who had taken a lease of apartments in a city, conditioned not to assign or underlet, occupied them with his servant; had his papers, letters, etc., delivered there; was visited there by his physician and by friends, slept there, though irregularly; and occasionally took breakfast there, though he voted at the last election in another town, where he formerly resided, and had arranged to occupy rooms at the club at some future time, and was held to have a residence where his apartments were.

In the last case, a person who kept a boarding house at Saratoga for several years from May to October, was held to be a resident while there.

See, also, Shepard & Morse Lumber Co. v. Burleigh, 27 App. Div. 99, where party's residence was held to be where his business was located and where he spent most of his time, though he spent his Sundays, where his family lived, in another county.

be "a residence at a particular place, accompanied with positive or presumptive proof of an intention to remain there for an unlimited time." To constitute a domicile two things must concur—first, residence; secondly, the intention to remain there. Domicile, therefore, or legal residence, means more than residence. A man may be a resident of a particular locality without having his domicile there. He can have but one domicile at one and the same time, at least for the same purpose, although he may have several residences.[101] It is extremely difficult to say what is meant by the word "residence," as used in particular statutes, or to lay down any particular rules on the subject. All the authorities agree that each case must be decided on its own particular circumstances, and that the general definitions are calculated to perplex and mislead.[102]

—— **Effect of different residences of co-parties.** The words "one of the parties," as used in the Code, does not necessarily embrace all the plaintiffs or all the defendants when they respectively consist of more than one person.[103] Where there are several plaintiffs and several defendants and the place of trial is to be governed by the residences of the parties, the action may be brought in a county in which only one defendant resides, irrespective of whether such defendant is a proper party,[104] or whether he has appeared, since the statute does not distinguish between those defendants who appear and those who do not.[105]

—— **Residence of corporation.** The place of residence of a domestic corporation for the purpose of fixing the proper county for trial of an action is the county in which its certificate of incorporation and annual reports are filed and which is designated by the certificate as the principal place of business, although the lands of the company are in part situated and much of its business transacted in other counties.[106] The

101 Cincinnati, H. & D. R. Co. v. Ives, 21 State Rep. 67.
102 Cincinnati, H. & D. R. Co. v. Ives, 21 State Rep. 67.
103 Shepard v. Squire, 58 State Rep. 247.
104 Jefferson County Bank v. Prime, 3 How. Pr. 278.
105 Forehand v. Collins, 1 Hun, 316.
106 Rossie Iron Works v. Westbrook, 59 Hun, 345, 36 State Rep. 555; Conroe v. National Protection Ins. Co., 10 How. Pr. 403; Duche v. Buf-

fact that it has an office in another county, where some of its business is done, does not make it a resident there. The residence is where the general business is transacted.[107] But the principal business of a railroad company cannot be said to be located in any county, and as it may have several places of business, it must also be deemed to have several places of residence.[108]

If one of the parties is a "foreign corporation" and the other a resident of New York, the place of trial must be laid in the county in which such resident resides, without regard to the fact that the corporation has a place of business in another county of the state,[109] since a foreign corporation cannot be a resident of this state. It has but one domicile, namely, in the sovereignty that incorporated it; and while a state may authorize a foreign corporation to do business within its boundaries, such a corporation does not thereby become a resident of that state.[110]

——**Residence of unincorporated association.** The residence of an unincorporated association sued by the name of its officers is the residence of its officers and not the place of business of the association,[111] since the officers and not the company is the "party" defendant.[112]

——**Actions relating to real property without the state.**

falo Grape Sugar Co., 11 Abb. N. C. 233; Speare v. Troy Laundry Machinery Co., 44 App. Div. 390; Remington & Shearman Co. v. Niagara Bank, 54 App. Div. 358.

107 Hubbard v. National Protection Ins. Co., 11 How. Pr. 149.

108 Poland v. United Traction Co., 85 N. Y. Supp. 7; Pond v. Hudson River R. Co., 17 How. Pr. 543.

109 International Life Assur. Co. v. Sweetland, 14 Abb. Pr. 240; Grover & Baker Sewing Mach. Co. v. Kimball, 64 Barb. 425; New Haven Clock Co. v. Hubbard, 40 State Rep. 654; Molson's Bank v. Marshall, 32 Misc. 602.

It is immaterial that the state of New York has issued a certificate authorizing the foreign corporation to do business in this state. Remington & Sherman Co. v. Niagara County Nat. Bank, 54 App. Div. 358.

110 Shepard & Morse Lumber Co. v. Burleigh, 27 App. Div. 99.

111 Bacon v. Dinsmore, 42 How. Pr. 368.

112 Woods v. De Figaniere, 24 Super. Ct. (1 Rob.) 607.

This class of actions includes actions relating to real property situated without the state.[113] Where the subject of the action is real estate in another state in which the defendants are resident and there are more than one plaintiff the place of trial is the county where one of them resides.[114]

—— **Actions against national banks.** The provisions of U. S. R. S., § 5198, as amended in 1875, that actions against national banks may be brought in any state, county, or municipal court in the county or city in which the bank is located, restrict the venue of actions only in respect to local courts, such as county and municipal courts, and do not limit the right to sue a national bank in the supreme court out of the county where it is located.[115]

—— **Action by the people.** An action by the people, such as quo warranto is properly brought in any county of the state, irrespective of the residences of the defendants.[116]

—— **Action by wife for divorce.** A wife living apart from her husband may bring her action for divorce in the county in which she resides, since her domicile does not follow that of her husband's, where a separation has actually taken place.[117]

§ 396. Place of trial where both parties are non-residents.

If neither of the parties resided in the state at the time of the commencement of the action, it may be tried in any county which the plaintiff designates for that purpose in the title of the complaint.[118]

§ 397. Place of trial of issue of law.

An "issue of law" may be tried in any county within the judicial district, embracing the county wherein the action is triable.[119] An issue of law arises only on a demurrer.[120] This

113 Code Civ. Proc. § 982.
114 Shepard v. Squire, 76 Hun, 598.
115 Talmage v. Third Nat. Bank, 91 N. Y. 531.
116 People v. Cook, 6 How. Pr. 448.
117 Vence v. Vence, 15 How. Pr. 497. See, also, Code Civ. Proc. § 1768.
118 Code Civ. Proc. § 984.
119 Code Civ. Proc. § 909.
120 Code Civ. Proc. § 964.

provision was not contained in the Code of Procedure, but is new and its meaning seems to have been seldom called in question. Under the practice before the Code, issues of law were brought to trial in the county designated by the court, which was not necessarily that in which the venue of the action was laid. By the Code of 1851 it was expressly provided that "issues of law must be tried only at the General Term, unless the court order the trial to be had at Special Term," but in the following year issues of law were first made triable at Special Term, and this practice has ever since prevailed, the place fixed for the trial of the action being regarded as the place of trial of any issue of law raised therein by the demurrer.[121] Under these provisions, it was held that an issue of law must be tried in the county designated in the complaint and that there was no distinction in this regard between issues of law and issues of fact,[122] whereas it was intimated that under the Code of 1849 demurrers might be noticed like motions for hearing at any Special Term within the judicial district embracing the county where the action was triable.[123] Under the present statute, the issue raised by a demurrer to an answer in an action brought in one county may be noticed for trial in another county within the judicial district and a judgment entered on defendant's disregarding the notice and suffering a default, will not be set aside as irregular.[124]

121 Kissam v. Bremmerman, 27 Misc. 14.
122 Christy v. Kiersted, 47 How. Pr. 467.
123 Ward v. Davis, 6 How. Pr. 274.
124 Kissam v. Bremmerman, 27 Misc. 14.

CHAPTER V.

PARTIES TO ACTIONS.

ART. I. SCOPE OF CHAPTER, DEFINITION, AND COMMON LAW RULES.

§ 398. In general.

Mr. Chitty, in the first chapter of his standard work on Pleading, says that there are no rules connected with the science and practice of pleading so important as those which relate to the persons who should be the parties to the action.[1] Much of the common law importanee attached thereto has, however, been removed by the more liberal rules adopted by the Codes in relation to parties and by the rules allowing a free amendment of pleadings. Many lawyers adopt the lax practice of joining every one in any way connected with the controversy and then let the adverse parties object on the

[1] Ch. Pl. (16th Ed.) 1.

ground of misjoinder. In this way, they are sure to avoid a defect of parties. It will be impossible to exhaustively discuss the question of parties as to do so would cause this chapter to fill a volume by itself.[2]

§ 399. Scope of chapter.

It is intended, in this chapter, to treat generally of the question as to parties to a civil action and discuss the Code provisions embraced in the chapter of the Code relating to parties. The proper or necessary parties in a particular action or special proceeding will not be enumerated but will be considered hereafter in the chapters relating to special actions and proceedings. Likewise questions as to parties dependent on one or more belonging to a particular class of persons or associations, will be treated of in a subsequent chapter entitled "Actions and proceedings by, against, or between, particular natural or artificial persons." The procedure where an infant desires to sue has already been considered.[3] This method of treatment will cause to be included in this chapter the general rules and in succeeding chapters the specific application of such rules together with special statutory rules which relate merely to a particular action, subject-matter, or class of persons. The manner of raising objections relating to parties will be considered in the chapter on "Pleading" and other chapters dealing with the particular proceeding.

§ 400. Definition.

Parties to an action are either the persons seeking relief or those against whom relief is sought, in the action.[4] The word "party" is often used to include all the plaintiffs or all the de-

[2] The books relating exclusively to parties to actions are those of Mr. Dicey and Mr. Barbour. Chitty on Pleading devotes considerable space to a discussion of parties at common law while Story's Equity Pleadings discuss quite fully parties to equitable suits. Perhaps the most extensive treatment of the Code provisions relating to parties is to be found in Pomeroy's Code Remedies.

[3] See ante, §§ 82-89.

[4] Cyc. Law Dict. 671.

fendants.[5] Parties are either "of record" being those in whose name the suit is brought, or who are named as defendants, or "not of record," who are those not so named, but who have a beneficial interest in the subject matter.[6] It has been held that the term "party to an action" is confined to one who is named as plaintiff or defendant and appears on the record as such,[7] and that a stockholder in a corporation is not a party to an action merely because the corporation is a party,[8] though a relator in a proceeding for a mandamus is a party.[9] A nominal plaintiff is one named as plaintiff in the action but who has little or no interest in it.[10] The question as to who is a party, within certain statutes or within the rule of res judicata, will be treated of in chapters relating thereto.

§ 401. Common law rules as to parties.

Mr. Dicey, in his valuable book on Parties to Actions, reduces the common law in regard to parties to a collection of rules.

I. First, he sets forth general rules as follows:

Rule 1. All persons can sue and are liable to be sued in an action at law.

Exception 1. Felons, outlaws and alien enemies cannot sue.

Exception 2. The sovereign, foreign sovereigns, and ambassadors cannot be sued.

Rule 2. No action can be brought except for the infringement of a right.

Rule 3. No action can be brought except for the infringement of a common law right.

Subordinate rule. Where one person has a legal and another an equitable interest in the same property,

[5] Sheldon v. Quinlen, 5 Hill, 441.
[6] Cyc. Law Dict. 671.
[7] Woods v. De Figaniere, 16 Abb. Pr. 1.
[8] Attorney General v. Continental Life Ins. Co., 66 How. Pr. 51.
[9] People ex rel. Harriman v. Paton, 20 Abb. N. C. 172.
[10] Cyc. Law Dict. 628.

any action in respect of such property must be brought by the person who has the legal interest.

Rule 4. An action may be brought for every infringement of a "legal" right.

Exception 1. Where an injurious act amounts to a public nuisance.

Exception 2. Where the wrong done amounts to a felony.

Rule 5. The same person cannot be both plaintiff and defendant.

Rule 6. The right to bring an action cannot be transferred or assigned.

Rule 7. No person can be sued who has not infringed on the right in respect of which the action is brought.

Rule 8. Every person can be sued who infringes on the right of another.

Rule 9. The liability to be sued cannot be transferred or assigned.

(Exceptions are assignment of liabilities on covenants which "run with the land," assignment of liability for debt by agreement of all the parties interested, and the assignment of liabilities in consequence of marriage, bankruptcy or death.)

II. The following rules are laid down as relating to the plaintiff in actions on contracts:

Rule 10. No one can sue for the breach of a contract who is not a party to the contract.

Rule 11. The person to sue for the breach of a simple contract must be the person from whom the consideration for the promise moves.

Exception 1. Actions by a person appointed by statute to sue on behalf of others.

Exception 2. Actions which can be brought either by a principal or an agent.

Exception 3. Some actions for money had and received.

Rule 12. The person to sue for the breach of a contract

by deed is the person with whom the contract is expressed by the deed to be made, i. e. the covenantee.

Subordinate rule. No one can sue on a covenant in an indenture who is not mentioned among the parties to the indenture.

Rule 13. All the persons with whom a contract is made must join in an action for the breach of it.

Rule 14. One and the same contract, whether it be a simple contract or a contract by deed, cannot be so framed as to give the promisees or covenantees the right to sue on it both jointly and separately.

Rule 15. The right to bring an action on contract cannot be transferred or assigned.

Exception 1. Contracts made assignable by statute.

Exception 2. Contracts or choses in action assignable by custom.

Exception 3. Assignment of a debt by agreement of all the parties.

Exception 4. Covenants annexed to, or running with, estates in land.

Exception 5. Assignment by marriage, bankruptcy or death.

Rule 16. The right of action on a contract made with several persons jointly, passes on the death of each to the survivors and on the death of the last to his representatives.

Exception. Covenants with tenants in common.

III. The following rules are laid down as relating to the defendant in actions on contract:

Rule 46. No person can be sued for a breach of contract who is not a party to the contract.

Rule 47. The person to be sued for the breach of a simple contract is the person who promises or who allows credit to be given to him.

Exception 1. Actions against a person appointed by statute to be sued on behalf of others.

Exception 2. Actions on some contracts implied by law or actions quasi ex contractu.

Rule 48. The person to be sued for the breach of a contract by deed is the person by whom the contract is expressed by the deed to be made, i. e. the covenantor.

Rule 49. Where several persons are jointly liable on a contract, they must all be sued in an action for the breach thereof, i. e., joint contractors must be sued jointly.

Exception 1. Where a co-contractor has become bankrupt.

Exception 2. Where a claim is barred against one or more joint debtors, and not against others.

Exception 3. Where a co-contractor is resident out of the jurisdiction.

Exception 4. Where an action is brought against common carriers.

Exception 5. Where an action is brought against a firm, some of the members of which are nominal or dormant partners.

Exception 6. Where a co-contractor is an infant or a married woman.

Rule 50. Covenantors and other contractors may be at once jointly and severally liable on the same covenant or contract, in which case they may be sued either jointly or separately.

Rule 51. The liability to an action on contract cannot be transferred or assigned.

Exception 1. Where there is a change of credit by an agreement between the parties.

Exception 2. Where there are covenants between lessor and lessee which run with the land.

Rule 52. The liability to an action on a contract made by several persons jointly passes at the death of each to the survivors, and on the death of the last to his representatives.

IV. The following rules apply to plaintiffs in actions for tort:

Rule 78. No one can bring an action for any injury which is not an injury to himself.

Rule 79. The person who sustains an injury is the person to bring an action for the injury against the wrongdoer.

Subordinate rule 1. The person to sue for any interference with the immediate enjoyment or possession of land or other real property is the person who has possession of it, and no one can sue merely for such an interference who has not possession.

Subordinate rule 2. For any permanent injury to the value of land, or other real property, i. e. for any act which interferes with the future enjoyment of, or title to, land, an action may be brought by the person entitled to a future estate in it, i. e. by the reversioner.

Subordinate rule 3. Any person may sue for an interference with the possession of goods, who, as against the defendant, has a right to the immediate possession of such goods; and no person can sue for what is merely such an interference who has not a right to the immediate possession of the goods.

Subordinate rule 4. Any person entitled to the reversionary interest in goods, may bring an action for any damage to such interest, or, in other words, to his right of ultimate possession.

Rule 80. (1) Persons who have a separate interest and sustain a separate damage must sue separately. (2) Persons who have a separate interest, but sustain a joint damage, may sue either jointly or separately in respect thereof. (3) Persons who have a joint interest must sue jointly for an injury to it.

Rule 81. The right of action for a tort cannot be transferred or assigned.

Rule 82. Where several persons have a joint right of action for a tort it passes on the death of each to the survivors, and on the death of the last (if the right of action be one that survives), to his representatives.

V. The following rules relate to defendants in an action of tort:

Rule 96. No person is liable to be sued for any injury of which he is not the cause.

Rule 97. Any person who causes an injury to another is liable to be sued by the person injured.

Exception. Where persons are protected from actions.

Rule 98. One, or any, or all of several joint wrongdoers may be sued.

Exception. Persons sued as joint owners of land.

Rule 99. The liability to be sued for a tort cannot be transferred or assigned.

Exception. Assignment by death.

Rule 100. Each wrong-doer's separate liability to be sued for a tort passes on his death (if it survives to all) to his personal representatives. The joint liability of several wrong-doers passes on the death of each to the survivors.

§ 402. Equity rules.

As the Code rules are practically a re-enactment of the rules of courts of equity, the equity rules will not be set forth here but will be separately considered in relation to joinder of parties. One thing to be remembered in connection with the Code re-enactment of the equity rules is that such re-enactment does not give a cause of action where none existed before.

ART. II. PLAINTIFF.

(A) REAL PARTY IN INTEREST.

§ 403. Code rule and exceptions thereto.

The most important rule introduced by the Code in regard to parties is the one that every action must be prosecuted in the name of the real party in interest. To this rule there are three exceptions set forth in the Code, viz; (1) an executor or administrator, (2) a trustee of an express trust, (3) or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted.[11] These exceptions, however, do not prevent the "real party in interest" suing in such cases, though it is not necessary that he do so. Thus the beneficiary may sue as the real

[11] Code Civ. Proc. § 449.

party in interest though his trustee may also sue, except in case of express trusts created in writing, as recognized in equity. This rule is well illustrated by actions on insurance policies, where the person for whose benefit the insurance was effected may sue, though he is not specifically named therein, or though the policy is payable to his agent.[12] So the person who is the owner of record or by a written instrument of premises or of a cause of action may sue in relation thereto in his own name, as the real party in interest irrespective of any private arrangement as to title or disposition of proceeds outside of his paper title.[13] So far as can be found no New York case defines the meaning of the phrase "the real party in interest," though it would seem that the "real party in interest" is the person having the real beneficial interest in the obligation sued on.[14] Thus a person, though not the owner of the vessel, may sue on a charter party, where he is authorized by the owner to contract and receive the earnings.[15]

A plaintiff does not cease to be the real party in interest by authorizing the payment of the proceeds of the action to another,[16] nor by contracting to sell part of the land for injury to which the action is brought.[17]

A few illustrations of who is the real party in interest in particular cases will be here noticed but the most of such illustrations will be found in subsequent chapters relating to particular actions or actions by, between, or against particular persons.

§ 404. Assignee.

The rule at common law was that non-negotiable things in action could not be assigned. This meant merely that the assignee could not bring a suit thereon in his own name, as such

[12] McLaughlin v. Great Western Ins. Co., 46 State Rep. 759; Palmer v. Great Western Ins. Co., 10 Misc. 167, 62 State Rep. 503.

[13] Sheridan v. City of New York, 68 N. Y. 30; Korn v. Metropolitan El. Ry. Co., 59 Hun, 505.

[14] Cyc. Law Dict. 771, 772.

[15] Donovan v. Sheridan, 4 Misc. 433, 53 State Rep. 586.

[16] Warshauer v. Webb, 9 State Rep. 529.

[17] Korn v. Metropolitan El. Ry. Co., 59 Hun, 505, 37 State Rep. 597.

assignments had been in fact recognized by the common law courts by permitting the assignee to sue in the name of the assignor and to have control over the action.

The Code established a new rule by providing that an action must be brought in the name of the real party in interest. The principal effect of such provision is that where a thing in action is assignable, the assignee thereof must sue in his own name. This rule is further emphasized by the Code provision that where a claim or demand can be transferred, the transfer thereof passes an interest enforceable by the transferee in his own name by an action or special proceeding, or which may be interposed as a defense or counterclaim in his own name, subject to any defense or counterclaim existing against the transferror before notice of the transfer, or against the transferee.[18] Such section is, however, not applicable where the rights or liabilities of a party to a claim or demand which is transferred, are regulated by special provisions of law, and it does not vary the rights or liabilities of a party to a negotiable instrument which is transferred.[19]

In order that an assignee may sue in his own name, it is not necessary that he be the legal owner of the demand. It is sufficient that his title is purely equitable in its character.[20] Furthermore the assignee of a claim or demand may sue on any incidental or collateral security connected with the demand, in his own name. Thus, an assignee of a judgment may sue in his own name on a bond collateral thereto.[21]

—— **Assignability of things in action.** The question whether an assignee of a thing in action may sue thereon, naturally depends on the further question as to what things in action are assignable. The general rule is that causes of action which survive are assignable, while those which do not survive are not assignable. Contracts which are purely personal do not survive, and hence are not assignable. The Code however sets at rest the question of what may be assigned by providing that

18 Code Civ. Proc. § 1909.

19 Code Civ. Proc. § 1909.

20 Peck v. Yorks, 75 N. Y. 421; Hastings v. McKinley, 1 E. D. Smith, 273.

21 Bowdoin v. Coleman, 3 Abb. Pr. 431.

any claim or demand can be transferred, except (1) where it is to recover damages for a personal injury or for a breach of promise to marry; or (2) where it is founded on a grant which is made void by a statute of the state or on a claim to, or interest in, real property, a grant of which by the transferror would be void by such a statute; or (3) where a transfer thereof is expressly forbidden by a statute of the state or of the United States, or would contravene public policy.[22] A "personal injury" includes libel, slander, criminal conversation, seduction, malicious prosecution, assault, battery, false imprisonment or other actionable injury to the person either of the plaintiff or of another.[23]

A cause of action to cancel, or otherwise affect, an instrument executed, or an act done, as security for a usurious loan or forbearance, can be transferred only where the instrument or act creates a specific charge on property, which is also transferred in disaffirmance thereof. Moreover the transferee does

[22] Code Civ. Proc. § 1901.

Cause of action based on fraud is assignable where the fraud relates to property. McKee v. Judd, 12 N. Y. (2 Kern.) 622; Moore v. McKinstry, 37 Hun, 194; Byxbie v. Wood, 24 N. Y. 607; Allen v. Brown, 51 Barb. 86; Johnston v. Bennett, 5 Abb. Pr., N. S., 331; Graves v. Spier, 58 Barb. 349; Lamphere v. Hall, 26 How. Pr. 509; Grocers' Nat. Bank v. Clark, 48 Barb. 26, 32 How. Pr. 160. (But see Zabriskie v. Smith, 13 N. Y. [3 Kern.] 322, which, however, has been practically overruled). So is a cause of action for conversion, Robinson v. Weeks, 6 How. Pr. 161; McKee v. Judd, 12 N. Y. (2 Kern.) 622; Gould v. Gould, 36 Barb. 270; Genet v. Howland, 30 How. Pr. 360; Hoy v. Smith, 49 Barb. 360; Richtmeyer v. Remsen, 38 N. Y. 206; Drake v. Smith, 12 Hun, 532; McKeage v. Hanover Fire Ins. Co., 81 N. Y. 38; Baumann v. Jefferson, 4 Misc. 147, 53 State Rep. 116. So is a cause of action against a common carrier for injuries to, or loss of, property, Butler v. New York & E. R. Co., 22 Barb. 110; Freeman v. Newton, 3 E. D. Smith, 246; Merrill v. Grinnell, 30 N. Y. 594; Smith v. New York & N. H. R. Co., 28 Barb. 605, 16 How. Pr. 277; Fried v. New York Cent. R. Co., 25 How. Pr. 285, as is a cause of action against a sheriff for neglect to arrest under a body execution, Dininny v. Fay, 38 Barb. 18, or for failure to return an execution against property, Jackson v. Daggett, 24 Hun, 204.

A cause of action for money lost on a bet is assignable. Meech v. Stoner, 19 N. Y. 26; McDougall v. Walling, 48 Barb. 364; Zeltner v. Irwin, 21 Misc. 13.

[23] Code Civ. Proc. § 3343, subd. 9.

not succeed to the statutory right of the borrower to procure relief without paying or offering to pay any part of the sum or thing loaned.[24]

—— **Where assignment is conditional or colorable.** The question has been raised as to whether the assignee is the real party in interest where the assignment is absolute in terms, but is in fact conditional or partial because of a contemporaneous or collateral agreement. The rule is settled that in such case such collateral agreement does not render him any the less the real party in interest.[25] Furthermore, the assignee under an assignment which is obviously colorable, is nevertheless the real party in interest.[26]

—— **Where assignment is of only a part.** In case of an assignment in parts, to several persons, of an entire demand, an assignee of one of the parts may sue to recover his part, notwithstanding that another assignee has collected his part of the demand by judgment.[27] Where the assignee of a part of a demand sues, however, he should make the owners of the balance, either party plaintiffs or defendants. If they refuse to join as plaintiffs they should be joined as defendants.

—— **Right of assignor to sue.** The assignor of a thing in action, where the assignment is not absolute but intended

[24] Code Civ. Proc. § 1911.

[25] Cummings v. Morris, 25 N. Y. 625; Allen v. Brown, 44 N. Y. 228; Meeker v. Claghorn, 44 N. Y. 349; Risley v. Smith, 64 N. Y. 576.

So held where agreement was to pay proceeds to assignor. Cannon v. Northwestern Mut. Life Ins. Co., N. Y. Daily Reg., April 6, 1883; Moore v. Robertson, 43 State Rep. 245.

Same rule where assignor is to share in recovery. Hecht v. Mothner, 4 Misc. 536, 54 State Rep. 121; Curran v. Weiss, 6 Misc. 138, 56 State Rep. 284; Walcott v. Hilman, 23 Misc. 459.

Where there is a valid and complete transfer of a cause of action, and a legal title has been conferred upon the assignee, it is of no consequence as bearing upon the question whether plaintiff is the real owner, what the consideration for the assignment was, or whether there was any, or what arrangement or understanding between the parties respecting the ultimate disposition of the proceeds of recovery. Moore v. Robertson, 25 Abb. N. C. 173.

[26] Cunningham v. Cohn, 14 Misc. 12, 69 State Rep. 498.

[27] Cook v. Genesee Mut. Ins. Co., 8 How. Pr. 514; Chambers v. Lancaster, 3 App. Div. 215.

merely as collateral security, may sue thereon as the real party in interest.[28] So where a debtor has assigned property to a third person in trust for the payment of his obligations, a creditor who owned a claim at the time of the creation of the trust but has since assigned the same, he, however, remaining liable for the amount thereof, may maintain an action against the trustee for the enforcement of the trust.[29]

§ 405. Third person for whose benefit a contract is made.

The person for whose benefit a promise is made, may sue thereon, as the real party in interest.[30] It does not follow that merely because the person with whom or in whose name a contract was made for the benefit of another is allowed to sue in his own name on such a contract as the trustee of an express trust, that the beneficiary is precluded from doing so, since the Codes have not altered the rule prevailing before their adoption, allowing the persons for whose benefit a contract is made to sue in his own name as the real party in interest.[31] It is not necessary that the third person be a privy to the consideration, or named as promisee, or cognizant of the promise when made.[32] Thus a promise which may be enforced by a third person, is a promise made to a creditor by his debtor to pay the debt to a creditor of the creditor.[33] So where the purchaser of a business agrees to pay the debts thereof, the cred-

[28] Lang v. Eagle Fire Co., 12 App. Div. 39; Ridgway v. Bacon, 72 Hun, 211.

[29] Pendergast v. Greenfield, 127 N. Y. 23.

[30] Lawrence v. Fox, 20 N. Y. 268; Eastern Plank Road Co. v. Vaughan, 14 N. Y. (4 Kern.) 546; Coster v. City of Albany, 43 N. Y. 399; Little v. Banks, 85 N. Y. 258; Todd v. Weber, 95 N. Y. 181; Murphy v. Whitney, 140 N. Y. 541. A case decided contra because of the peculiar facts therein is Lorillard v. Clyde, 122 N. Y. 498. For additional authorities, see Abb. Cyc. Dig. 759-771.

[31] Rogers v. Gosnell, 51 Mo. 466.

[32] Barlow v. Myers, 64 N. Y. 41. Defendant having covenanted for a valid consideration to pay for attendance upon a person in her illness, held that plaintiff who rendered the service referred to, though not a party to the covenant and not aware of it, could maintain an action upon it. Riordan v. First Presbyterian Church, 6 Misc. 84, 55 State Rep. 396.

[33] Lawrence v. Fox, 20 N. Y. 268; Garnsey v. Rogers, 47 N. Y. 233.

itors may sue the purchaser directly,[34] and where a purchaser of premises agrees to pay debts of the grantor or a lien thereon, the creditor or lien-holder may enforce such obligation by a direct action.[35] Likewise, where a new firm takes and appropriates all the assets of a former firm, and in consideration thereof assumes and agrees to pay its debts, a creditor of such former firm may maintain an action against the new firm upon such promise.[36] And where the construction of the whole transaction is that the original debtor put all his property into the hands of the promisors by absolute transfer upon their promise to pay the plaintiff's debt with others, although plaintiff was not a party to the transaction, it will be deemed for his benefit, and as the promise is founded upon a new and valid consideration, he may enforce it.[37] So where one person procures his own life to be insured, pays the premium, and accepts the policy, expressed to be for the benefit of a third person, the latter may recover thereon by an action in his or her own name,[38] and where a policy on the life of one, is held by another person to whom it is made payable, but for the benefit of the person whose life is insured, or whomsoever the latter may designate, and such person allows the policy to remain in the hands of the payee, upon his express or implied promise to pay a debt of the insured out of its proceeds when collected, the creditor for whose benefit the promise was made may affirm and enforce it, though it was made without his knowledge.[39]

If a promise is made for the benefit of a third person, acceptance by the latter is presumed, until dissent is shown.[40]

[34] Connor v. Williams, 25 Super. Ct. (2 Rob.) 46; Berbling v. Glaser, 3 Misc. 624; Reynolds v. Lawton, 62 Hun, 596.

[35] Watkins v. Vrooman, 51 Hun, 175; Seaman v. Hasbrouck, 35 Barb. 151; Hallenbeck v. Kindred, 109 N. Y. 620.

A grantee of land who has agreed to pay a mortgage thereon, may be sued by the mortgagee. Campbell v. Smith, 71 N. Y. 26; Wager v. Link, 150 N. Y. 549; Ranney v. McMullen, 5 Abb. N. C. 246.

[36] Allendorph v. Wheeler, 101 N. Y. 649.

[37] Clark v. Howard, 150 N. Y. 232.

[38] Hogle v. Guardian Life Ins. Co., 4 Abb. Pr., N. S., 346, 29 Super. Ct. (6 Rob.) 567.

[39] Hutchings v. Miner, 46 N. Y. 456.

[40] Hand v. Kennedy, 45 Super. Ct. (13 J. & S.) 385.

—— **Limitations of rule.** The leading case announcing this rule is that of Lawrence v. Fox,[41] but subsequent cases have repeatedly stated that the doctrine should be confined to its original limits,[42] and have engrafted limitations thereon.

First, it must clearly appear that the contract was intended for the benefit of the third person. The object must have been his benefit and he must be the precise person intended to be benefited.[43] The contract must be an original contract and not a mere contract of indemnity.[44] A valid consideration must pass to the promisor at the time of the promise, and the agreement containing such promise must be in the nature of an original agreement between the promisor and the party from whom the consideration moved.[45]

Second, there must be some obligation or duty owing from the promisee to the third person, which would give the latter a legal or equitable claim to the benefits of the promise, or an

[41] Lawrence v. Fox, 20 N. Y. 268.

[42] Durnherr v. Rau, 135 N. Y. 219.

[43] Simson v. Brown, 68 N. Y. 355; Beveridge v. New York El. R. Co., 112 N. Y. 1; Wainwright v. Queens County Water Co., 78 Hun, 146; Garnsey v. Rogers, 47 N. Y. 233; Martin v. Peet, 92 Hun, 133.

When two persons, for a consideration sufficient as between themselves, covenant to do some act, which if done would incidentally result in the benefit of a mere stranger, that stranger has not a right to enforce the covenant, although one of the contracting parties might enforce it as against the other. Lake Ontario Shore R. Co. v. Curtiss, 80 N. Y. 219.

A promise to pay one-quarter of the debts of the firm made by a partner and for the sole benefit of the firm does not inure to the benefit of any specific creditor so as to enable him to maintain an action thereon. Wheat v. Rice, 97 N. Y. 296.

So an instrument signed by citizens of a village pledging themselves to take stock in a railroad company, on condition that it build its road through the village cannot be sued on by the railroad company, where it was merely a promise between the signers. Lake Ontario Shore R. Co. v. Curtiss, 80 N. Y. 219.

[44] Martin v. Peet, 92 Hun, 133.

Thus an agreement whereby defendants agreed to pay any judgment against another, is a contract of indemnity, and not an original contract on which a third person who had obtained a judgment, not being privy to the agreement, could sue. Feist v. Schiffer, 79 Hun, 275, 60 State Rep. 859.

[45] Fairchild v. Feltman, 32 Hun, 398.

equivalent from the promisee personally.[46] It is true there need be no privity between the promisor and the party claiming the benefit of the undertaking, neither is it necessary that the latter should be a privy to the consideration of the promise, but it does not follow that a mere volunteer can avail himself of it. A legal obligation or duty of the promisee to the third person will so connect him with the transaction as to be a substitute for any privity with the promisor, or the consideration of the promise, the obligation of the promisee furnishing an evidence of the intent of the latter to benefit him, and creating a privity by substitution with the promisor.[47] There must be either a new consideration or some prior right or claim against one of the contracting parties, by which he has a legal interest in the performance of the agreement. This obligation may, however, rest on the relationship of the parties.

Thus the duty of a husband, who is the promisee, to provide for the future of his wife, who is the third person, in connection with other equities, may be enough to sustain an action by the latter.[48] So the obligation of a parent, who is the promisee, to a child, who is the third person intended to be benefited, is sufficient to support an action by the child,[49] and a promise made to a mother to pay a sum of money to the son by will is enforceable by the son.[50]

Third, the contract must be a valid one as between the promisor and the promisee. So one for whose benefit a promise is

[46] Townsend v. Rackham, 143 N. Y. 516; Bogardus v. Young, 64 Hun, 398; Gates v. Hames, 28 State Rep. 313; Lorillard v. Clyde, 56 Super. Ct. (24 J. & S.) 14; Durnherr v. Rau, 135 N. Y. 219; Vrooman v. Turner, 69 N. Y. 280; Litchfield v. Flint, 22 Wkly. Dig. 286.

A good illustration of this rule is to be found in Richard Thompson Co. v. Brook, 37 State Rep. 506, where the officers of a corporation agreed among themselves to accept a reduced salary for future services, but such agreement was not communicated to or accepted by the board of directors of the corporation.

[47] Vrooman v. Turner, 69 N. Y. 280; Litchfield v. Flint, 104 N. Y. 543.

[48] Buchanan v. Tilden, 158 N. Y. 109.

[49] Luce v. Gray, 92 Hun, 599, 72 State Rep. 85; Babcock v. Chase, 92 Hun, 264.

Relation between father and illegitimate child is sufficient. Todd v. Weber, 95 N. Y. 181.

[50] Whitcomb v. Whitcomb, 92 Hun, 443.

made cannot enforce it when it is void between the promisor and promisee for fraud or want or failure of consideration, and such a promise is subject to the equities between the parties to it at the time it is made.[51]

§ 406. In actions on negotiable instruments.

The Code provides that the provision authorizing the transferee of a claim or demand to sue or be sued in his own name, does not vary the rights or liabilities of a party to a negotiable instrument which is transferred.[52] The rule of negotiable instruments is that possession is prima facie evidence of ownership and the indorsee of the instrument is the holder of the legal title, though he is not the real party in interest. An action on a negotiable instrument must be brought by the owner, i. e. the holder of the legal title. Shortly after the adoption of the Code, the question arose as to whether a defendant sued on a note by a person who is apparently the legal owner thereof, could prove that as a matter of fact, the plaintiff was not the real owner of the note, and hence not the real party in interest. The early cases held that the defendant could show such fact, but the contrary rule was laid down by the court of appeals and has since been adhered to.[53] The rule is laid down that in the absence of mala fides in a plaintiff's possession of promissory notes, indorsed in blank, or specially to himself or his own order, the legal title is in him, and he is legally the real party in interest.[54] Thus defendants cannot show that plaintiff is not the real party in interest by showing that there was no consideration for the indorsement of the paper to plaintiff.[55] Nevertheless an indorsement of commercial paper to a mere agent for collection does not constitute him a trustee of an express trust[56] nor is

[51] Dunning v. Leavitt, 85 N. Y. 30.

[52] Code Civ. Proc. § 1909.

[53] Eaton v. Alger, 47 N. Y. 345.

[54] Freeman v. Falconer, 44 Super. Ct. (12 J. & S.) 134; Hays v. Southgate, 10 Hun, 511.

[55] Freeman v. Falconer, 45 Super. Ct. (13 J. & S.) 383; Amy v. Stein, 48 Super. Ct. (16 J. & S.) 512.

[56] Iselin v. Rowlands, 30 Hun, 488.

he the real party in interest so as to be entitled to sue on the note, inasmuch as he has not the legal title,[57] but where the payee of a note delivered it to plaintiff on his undertaking to collect it at his own expense and pay to the payee on its collection a specified sum, the plaintiff is the real party in interest and may sue on the note.[58, 59]

§ 407. In actions ex delicto in general.

The common law rule as to the person who shall be plaintiff in actions based on a tort has not been materially changed by the Codes. This matter will be fully treated of hereafter in so far as it relates to parties to actions of tort relating to real or personal property. It is sufficient to state at this place that if the injury is to real property, the tenant must sue if the injury relates to his interest, while if it is of a permanent nature, the landlord, remainderman or reversioner must sue. If the injury is to personal property, the general owner may sue providing he has the right to immediate possession, though the injury occurs when the property is in the possession of another.[60] But if the injury is of a nature such as to permanently affect the property, the owner may sue, though he has not the right to the immediate possession. Likewise, the person in possession may sue for injury or loss to the property, as where he is a bailee.[61] Thus a carrier may sue in its own name for an injury to property intrusted to it to be carried, or to recover possession thereof.[62]

§ 408. In actions against a common carrier.

An action against a carrier for the breach of his contract or of his duty to carry, must ordinarily be brought in the name of the owner of the goods, though the contract may have been made, or the goods shipped by another, though where the con-

57 Gerding v. Welch, 30 App. Div. 623, 51 N. Y. Supp. 1064.

58, 59 Eaton v. Alger, 47 N. Y. 345.

60 Ogden v. Coddington, 2 E. D. Smith, 317.

61 Kellogg v. Sweeney, 1 Lans. 397; Paddock v. Wing, 16 How. Pr. 547.

62 Merrick v. Brainard, 38 Barb. 574; Fitzhugh v. Wiman, 9 N. Y. (5 Seld.) 559.

signor has a lien on, or a special interest in the goods, and he makes the contract and pays for the carriage, he may sue in his own name.[63] The consignee cannot sue, unless he has an interest in the goods consigned.[64]

§ 409. Principals.

As will be more fully seen in a subsequent chapter, a principal may usually sue on a contract made by his agent, as the real party in interest. The exception to this rule is that an action on a sealed instrument must be brought in the name of the party signing it. This rule exists as a matter of course because of the other rule that the principal is not liable on a contract under seal, made in fact by an agent or an attorney and not in the name of the principal, and that parol evidence is inadmissible to show the relation of principal and agent. Thus, where it distinctly appears from the instrument executed that the seal affixed is the seal of the person subscribing, who designates himself as agent, and not the seal of the principal, the agent is the real party in interest. He can maintain an action on it and no other person can sue thereon.[65] So one who executed a lease under seal as attorney and agent for the owners, is entitled to sue for rent upon it, as the only party of the first part, and his action cannot be defeated upon the ground he is not the real party in interest.[66]

The rule also applies where the action is not brought directly on the sealed instrument but is for fraud in inducing a party to enter into the contract.[67]

But if a contract not under seal is made with an agent in his own name for an undisclosed principal, whether or not he describes himself to be an agent, either the agent or principal may sue on it.[68]

[63] Swift v. Pacific Mail Steamship Co., 106 N. Y. 206; Sweet v. Barney, 23 N. Y. 335.

[64] Ogden v. Coddington, 2 E. D. Smith, 317.

[65] Schaefer v. Henkel, 75 N. Y. 378.

[66] Melcher v. Kreiser, 28 App. Div. 362; Henricus v. Englert, 137 N. Y. 488.

[67] Denike v. De Graaf, 87 Hun, 62.

[68] Ludwig v. Gillespie, 105 N. Y. 653; Manette v. Simpson, 39 State Rep. 617.

An employer or principal whose money is lost by his employee or agent in gaming may recover the same as the real party in interest.[69]

§ 410. Attorneys.

In contracts made by attorneys acting as such, they are capable of suing and are liable to be sued in the same manner as other agents or factors.[70] Thus an attorney may sue in his own name, as the real party in interest, a newspaper company for his disbursements and the value of his services rendered necessary by failure to publish a citation as agreed.[71]

§ 411. Depositary.

A mere depositary of notes is not the real party in interest so as to be able to sue thereon, where not paid at maturity.[72]

§ 412. Objection as defense.

The defense that plaintiff is not the real party in interest where the real party in interest is required to sue, is generally a bar to the suit, except, as has been seen, in actions on negotiable instruments.[73] The objection must be raised by answer or demurrer.[74]

(B) EXCEPTIONS TO REAL PARTY IN INTEREST RULE.

§ 413. Trustee of express trust.

A trustee of an express trust may sue in his own name without joining with him the beneficiary of the trust. This is merely a Code re-enactment of a rule of equity. A person with whom, or in whose name a contract is made for the benefit of another, is a trustee of an express trust within this rule. The

[69] Caussidiere v. Beers, 2 Keyes, 198, 1 Abb. App. Dec. 333; Conway v. Conway, 4 Misc. 312; Pulver v. Burke, 56 Barb. 390.

[70] Brock v. Barnes, 40 Barb. 521.

[71] Gray v. Journal of Finance Pub. Co., 2 Misc. 260, 50 State Rep. 764.

[72] Knickerbocker Trust Co. v. Polley, 26 Misc. 282.

[73] Moody v. Libbey, 1 Abb. N. C. 154.

[74] Post, p. 957.

Code so expressly provides.[75] Further than this, the Code does not attempt to define who is a trustee of an express trust. The question has been the subject of much legal discussion.[76] In its legal sense, an express trust is one created in express terms by a writing, while an implied trust is one deducible from the nature of the transaction as matter of intent or which is superinduced on the transaction by operation of law as a matter of equity independent of the particular intention of

[75] Code Civ. Proc. § 449.

[76] In Considerant v. Brisbane, 22 N. Y. 389, the following language is used:

"Express trusts, at least up to the adoption of the Revised Statutes, were defined to be trusts created by the direct and positive acts of the parties by some writing, or deed, or will, and the Revised Statutes had abolished all express trusts except as therein enumerated, which related to land. If the 113th section of the Code was to be confined and limited to those enumerated as express trusts, the practical inconvenience arising from making the beneficial interest the sole test of the right to sue, and which that section was intended to obviate, would continue to exist in a large class of formal and informal trusts. Accordingly, in 1851, the section was amended by adding the provision that 'a trustee of an express trust, within the meaning of the section, shall be construed to include a person with whom or in whose name a contract is made for the benefit of another.' It is to be observed that there is no attempt to define the meaning of the term 'trustee of an express trust' in its general sense; but the statutory declaration is, that those words 'shall be construed to include a person with whom, or in whose name a contract is made for the benefit of another.' The counsel for the respondent insists that the sole intention of the legislature, in amending the section, was to remove a doubt that had been expressed, whether a factor or other agent who had at common law a right of action on a contract made for the benefit of his principal (by reason of his legal interest in the contract) was, by the Code, deprived of that right. But no such limited intention can be inferred from the words of the statute. Indeed, it is only by a liberal construction of the section that the case of a contract by a factor, (an individual contract), can be brought within it at all. It is intended, manifestly, to embrace, not only formal trusts, declared by deed, inter partes, but all cases in which a person, acting in behalf of a third party, enters into a written, express contract with another, either in his individual name, without description, or in his own name, expressly in trust for, or on behalf of, or for the benefit of, another, by whatever form of expression such trust may be declared. It includes not only a person with whom, but one in whose name, a contract is made for the benefit of another."

the parties. The latter term is used in its general sense as including constructive and resulting trusts.[77] In order to create an express trust there must be property as the subject matter, proper parties (grantor, grantee and beneficiary), and an intention to create the relation.[78] Now, it is clear that a person with whom or in whose name a contract is made for the benefit of another, is not a trustee of an express trust as the term was used at common law or as defined by the Revised Statutes. So it seems that a trustee of an express trust is either a trustee created by an instrument in writing[79] or is a person with whom or in whose name a contract is made for the benefit of another, who is a trustee of an express trust merely because the Code says that he is.[80]

As the Codes intermingle these two classes of persons under one name, i. e., a trustee of an express trust, it is not necessary to separate the cases where there is really an express trust from those where there is none except as the Code says there is, but examples will be given of some of the decisions.

—— **Agents.** An agent is a person with whom or in whose name a contract is made for the benefit of another, within thus rule, and hence he may sue in his own name on a contract entered into with him, though it is known that he is acting as such for a known principal. A fortiori an agent may sue in his own name where the principal is unknown at the time the contract is entered into or is not mentioned in the instrument. So where B. executed two subscription notes, whereby he promised to pay a certain specified sum to "C., as executive agent of" a foreign corporation, C. was "a trustee of an express trust."[81] The same rule applies to a factor who contracts in his own name, on behalf of his principal,[82] or an auctioneer who sells goods in his own name, to a third person.[83] Likewise, an indorsee of a bill of lading to whom the mer-

77 Considerant v. Brisbane, 22 N. Y. 389.
78 People v. Groat, 22 Hun, 164.
79 Cyc. Law Dict. 926.
80 Brown v. Cherry, 56 Barb. 635, 38 How. Pr. 352.
81 Considerant v. Brisbane, 22 N. Y. 389.
82 Grinnell v. Schmidt, 4 Super. Ct. (2 Sandf.) 706.
83 Bogart v. O'Regan, 1 E. D. Smith, 591.

chandise is consigned for sale may maintain an action against the carrier for damages for delivery in a damaged condition, as a trustee of an express trust.[84]

—— **Assignee in trust.** One to whom a contract for payment of money is assigned, in trust for one who had made advances to the assignor, may sue thereon, as trustee of an express trust.[85] So where a borrower of money from various persons, transferred to plaintiff notes payable by various persons, to be held by him as collateral security for repayment of the loan, plaintiff held the notes as trustee of an express trust, and an action on them was properly brought in his name.[86] Likewise, one to whom letters patent had been assigned to enable him to grant licenses to persons desiring to use the invention and to collect royalties for such use and pay them over to the inventor, is a trustee of an express trust.[87]

—— **Banker.** An individual banker who is the nominal proprietor of his bank, though others are interested with him, is, as respects such others, trustee of an express trust, and may sue in his own name a security taken in the course of the business.[88]

—— **Attorney.** An attorney who takes notes for the benefit of creditors may sue on them in his own name as a trustee of an express trust.[89]

—— **The people.** An action in the name of the people on an official bond, to recover for a defalcation of moneys belonging to the relator, has been held authorized on the ground that the people were the trustee of an express trust.[90]

[84] Robertson v. National Steamship Co., 14 N. Y. Supp. 313.

[85] Cummins v. Barkalow, 1 Abb. App. Dec. 479, 4 Keyes, 514.

[86] Clark v. Titcomb, 42 Barb. 122.

[87] Keller v. West, Bradley & Cary Mfg. Co., 39 Hun, 348.

[88] Burbank v. Beach, 15 Barb. 326.

[89] Crouch v. Wagner, 63 App. Div. 526.

[90] It was said that the provisions of Code Civ. Proc., § 449, concerning parties to actions, should receive a broad and liberal construction in all instances where the action is founded on an official bond to recover money for the benefit of those entitled thereto. People ex rel. Nash v. Faulkner, 31 Hun, 317.

But a bond given by an applicant for a tavern license is not such a bond that the people can sue thereon as trustees of an express trust

—— **In insurance policy.** A person in whose name an insurance policy "for whom it may concern" is made, is a trustee of an express trust,[91] as is a person who takes a policy of insurance in his own name, but in behalf of the owner, and who acts as agent for an unnamed, though known principal,[92] or a husband who takes out a policy of insurance on his own life for the benefit of his wife,[93] or the executor of the insured in a policy payable to him for the benefit of the insured's father,[94] or the assignee of a life policy in trust for the wife of the insured.[95] But a policy upon the life of a father for the benefit of his son and payable by the terms of the policy to the latter cannot be sued upon by the personal representatives of the father, as the fact that the father united in the application for the insurance does not make him a trustee of the express trust.[96]

—— **Beneficiary may also sue.** As has already been stated, it must be borne in mind that the fact that the trustee is allowed to sue does not prevent an action by the beneficiary as the real party in interest, except where there is an express trust in writing, as the term is used in equity.

§ 414. Executors and administrators.

The exception that executors and administrators may sue in their own name alone is elementary, and the rule is reiterated by a further Code provision that an action or special proceeding commenced by an executor or administrator on a cause of action belonging to him in his representative capacity, must be brought by him in that capacity.[97,98]. The ques-

since there are no cestuis que trust nor property which can be the subject of a trust. People v. Groat, 22 Hun, 164.

[91] Duncan v. China Mut. Ins. Co., 129 N. Y. 237; Hughes v. Mercantile Mut. Ins. Co., 44 How. Pr. 351.

[92] Pitney v. Glen's Falls Ins. Co., 65 N. Y. 6.

[93] Kerr v. Union Mut. Life Ins. Co., 69 Hun, 393.

[94] Grattan v. National Life Ins. Co., 15 Hun, 74; Greenfield v. Massachusetts Mut. Life Ins. Co., 47 N. Y. 430.

[95] St. John v. American Mut. Life Ins. Co., 13 N. Y. (3 Kern.) 31.

[96] Cyrenius v. Mutual Life Ins. Co., 145 N. Y. 576.

[97, 98] Code Civ. Proc. § 1814.

tion whether an executor or administrator shall sue in his representative capacity or personally will be fully considered in a subsequent chapter.

§ 415. Persons expressly authorized by statute.

The exception that a person expressly authorized by statute may sue without joining with him the person for whose benefit the action is prosecuted, applies to a great extent to statutory provisions authorizing an action by public officers and also by the officers of an association or of a corporation. Thus suits on a bond are not to be prosecuted in the name of the real party in interest, where a special statute requires them to be prosecuted in the name of the people or of a specified officer.[99] There are also special statutory provisions authorizing one other than the real party to sue on a cause of action to recover land held adversely,[100] and authorizing certain persons to sue for the benefit of relatives, on a cause of action for death by wrongful act.[101] Such statutory provisions will be fully considered hereafter in connection with the procedure relating to particular persons, associations or corporations.

ART. III. DEFENDANT.

§ 416. Those who may sue may be sued.

The equitable rule that those who may sue may be sued generally prevails under the Code. So an executor, administrator, or person expressly authorized by statute to sue, can be prosecuted by action in pursuance of the same authority that accords him the privilege of invoking the aid of the courts.[102]

§ 417. A party plaintiff cannot be a defendant.

The same person cannot be both plaintiff and defendant. So a trustee of a religious society cannot be sued by his co-

99 Hoogland v. Hudson, 8 How. Pr. 343.
100 Code Civ. Proc. § 1501.
101 Code Civ. Proc. § 1902.
102 Lawrence v. Schaefer, 19 Misc. 239.

trustees, to recover the possession of property of the church since trustees, in law, are a single person.[103]

§ 418. Code rule.

The Code provides that any person may be made a defendant who has, or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party defendant for the complete determination or settlement of a question involved therein, except as otherwise expressly prescribed.[104] The words "except as otherwise expressly prescribed" were stated by Mr. Throop to be inserted to avoid doubts in special cases, as where an executor has not qualified. It will be seen that this provision is permissive and not mandatory. It is not confined to actions in equity, but also applies to legal actions.[105] In 1901 this Code provision was amended by adding that in any action affecting real estate on which the people of the state have or claim to have a lien under the Transfer Tax act, the people may be made a party defendant in the same manner as a private person.[106]

§ 419. Unknown defendant.

Where plaintiff does not know part or all of the name of the defendant, he may designate him in the summons, complaint or other process, by a fictitious name, or by as much of his name as is known, adding a description identifying the person intended.[107] Where plaintiff demands judgment against an unknown person, he may designate the person as unknown, adding a description tending to identify him.[108] When the name, or the remainder of the name, or the preson,

[103] Trustees of First Soc. of Methodist Episcopal Church v. Stewart, 27 Barb. 553.

[104] Code Civ. Proc. § 447. The application of this rule to particular actions will be considered in connection with chapters relating thereto.

[105] Wokal v. Belsky, 53 App. Div. 167.

[106] L. 1901, c. 609.

[107] Code Civ. Proc. § 451. As to designation in summons, see post, pp. 717, 718. As to designation in complaint, see post, p. 930.

[108] Id.

becomes known, the court must make an order, on notice and terms such as it may prescribe, that the proceedings already taken be deemed amended by the insertion of the true name in place of the fictitious name or part of the name or the designation as an unknown person, and that all subsequent proceedings be taken under the true name.[109]

ART. IV. JOINDER OF PARTIES.

(A) GENERAL CONSIDERATIONS.

§ 420. Proper and necessary parties distinguished.

Before entering into a consideration of the rules relating to joinder of parties, it is well to clearly grasp the difference between proper co-parties and necessary co-parties. In an early New York chancery case, it was said that persons are "necessary" parties when no decree respecting the subject matter of the litigation can be made until they are before the court, either as complainants or defendants, or where the defendants already before the court have such an interest in having them made parties as to authorize those defendants to object to proceeding without such parties.[110] Mr. Pomeroy, in his work on Code Remedies, defines necessary parties as those without whom no decree at all can be effectively made determining the principal issues in the cause, and proper parties as those without whom a substantial decree may be made, but not a decree which will completely settle all the questions which may be involved in the controversy and conclude the rights of all the persons who have any interest in the subject matter of the litigation.[111] He further brings out the distinction that a person is not a necessary party, as defined, merely because he must be joined as a defendant in a particular suit in order that the judgment may bind him, and he illustrates this distinction by the example of a suit to foreclose a mortgage, in which the holders of subsequent liens are not necessary parties, because not necessary to the decision of the main issues involved in the suit and to the granting of a decree,

109 Code Civ. Proc. § 451.
110 Bailey v. Inglee, 2 Paige, 278.
111 Pom. Code Rem. (3d Ed.) pp. 395, 396.

though they are necessary in order to settle all the questions involved in one controversy. He states as a practical test, which will at once fix the class into which any given person interested in an equitable litigation must fall, that if the person is a necessary defendant, a demurrer for defect of parties on account of his non-joinder will be sustained, while if a given person is merely a proper party, such a demurrer will not be sustained on account of his non-joinder, though the court may undoubtedly, in the exercise of its discretion, order him to be brought in.[112]

§ 421. Common law rules.

In order to understand the Code provisions relating to joinder of parties, it is necessary to briefly consider the rules existing at common law prior to the adoption of the Codes. Rights were classified as joint and several. Liabilities were either joint, joint and several, or several. If the right was joint all the persons having such joint rights were required to join as plaintiffs. If one of the joint owners died, his survivors were required to sue alone without joining the representatives of the deceased. If the right was several the covenantees or promisees were required to sue separately in case of contract and the same rule applied in actions of tort in which it was held that the person suffering the injury must sue separately. If the obligation on which the defendants were sued was joint, it was necessary that all the obligors should be joined. If the liability was joint and several, all the obligors could be sued in one action or each one could be sued in a separate action, but a suit could not be brought against more than one and less than all of the obligors. If the obligation was several, a joinder of defendants was not permitted. The rule is often stated that in common-law actions no person should be named on the record as a party, except such as must have judgment passed for or against them.[113]

§ 422. What constitutes joint obligation or liability.

The question of what constitutes a joint obligation so as

112 Pom. Code Rem. (3d Ed.) 397.
113 Porter v. Mount, 45 Barb. 422.

to result in a joint liability, is one of substantive law, but as the necessity of joinder of parties may depend thereon, it will be briefly considered in this connection.[114] The question is whether the right or liability is joint, joint and several, or several.

In the first place, the liability arising from contract concerning two or more persons is presumed to be joint, unless express words and terms make it several or joint and several.[115] Thus an undertaking providing "that we * * * do hereby, pursuant to the statute in such case made and provided, undertake," etc., creates a joint and not a several obligation.[116] So a several promise to pay for services cannot be inferred as against one of several persons at whose joint instigation and request the services were rendered.[117] And where two parties signed a contract which was in terms joint, but one added to his name the word "surety," both were necessary parties to an action thereon.[118] Where judgment is rendered against two or more, they are considered joint debtors in respect to such judgment.[119]

On the other hand, a joint and several liability usually arises from a statement in the writing that the promise is joint and several, though if several persons sign a paper, but the promise is in the singular number, the liability is deemed joint and several, and where the writing declares that the three obligors, "and each of them are bound," they are bound severally as well as jointly.[120] So a subscription agreement, where the signers agree mutually among themselves to pay certain sums, is a several agreement.[121] If a covenant is capable of interpretation as either joint or several as regards the covenantees it will be construed as several, if their rights are such

[114] For collection of authorities as to what constitutes joint agreements and liabilities, see 8 Abb. Cyc. Dig. 411-429.

[115] Rosenzweig v. McCaffrey, 28 Misc. 485.

[116] Wood v. Fisk, 63 N. Y. 245, which overruled Morange v. Mudge, 6 Abb. Pr. 243; Perry v. Chester, 12 Abb. Pr., N. S., 131.

[117] Davidson v. Westchester Gas-Light Co., 99 N. Y. 558.

[118] Cook v. McIncrow, 6 Wkly. Dig. 444.

[119] Barnes v. Smith, 16 Abb. Pr. 420, 24 Super. Ct. (1 Rob.) 699.

[120] Episcopal Church of St. Peter v. Varian, 28 Barb. 644.

[121] Bort v. Snell, 39 Hun, 388.

as between themselves.[122] A contract is not rendered joint rather than several because of the fact that persons are joined as parties of the second part, where the covenant is to pay each a proportionate sum.[123]

——**Liability for torts.** The rule is that where there is a joint obligation, there is a joint liability.[124] In actions based on a tort the liability is generally joint and several. Thus the liability for an injury resulting from the concurrent, though not joint, negligence of two persons or corporations, is joint and several,[125] though the wrong-doers are partners.[126] So persons maintaining a nuisance by their several acts or omissions, are jointly and severally liable,[127] and municipalities having a joint duty, are liable jointly and severally for joint negligence.[128] The liability for an assault is several,[129] as is the liability for a slander. In a few instances, torts are essentially joint. Thus parties to a fraud in inducing a purchase are jointly liable,[130] as are the parties for whose benefit a sum is received by a common agent through a forgery.[131] But the fact that the grievance of each plaintiff arises in respect to the same property, does not make a transaction joint which is in its nature separate and distinct.[132]

§ 423. Effect of death of joint obligor on his liability.

Previous to the enactment of section 758 of the Code of Civil Procedure which provides that the estate of a person or party jointly liable on contract with others shall not be discharged by his death, and the court may make an order to bring in

122 Warner v. Ross, 9 Abb. N. C. 385.
123 Vandermulen v. Vandermulen, 108 N. Y. 195.
124 Rider Life Raft Co. v. Roach, 97 N. Y. 378.
125 Colegrove v. New York & N. H. R. Co., 20 N. Y. 492.
126 Creed v. Hartmann, 29 N. Y. 591; Rappaport v. Werner, 34 App. Div. 525.
127 Simmons v. Everson, 124 N. Y. 319; Irvin v. Wood, 27 Super. Ct. (4 Rob.) 138.
128 Hawxhurst v. City of New York, 15 Abb. N. C. 181.
129 Olzen v. Schierenberg, 3 Daly, 100.
130 Garner v. Mangam, 93 N. Y. 642.
131 National Trust Co. v. Gleason, 77 N. Y. 400.
132 Hynes v. Farmers' Loan & Trust Co., 31 State Rep. 136.

the proper representative of the decedent when it is necessary so to do for the proper disposition of the matter, and may order a severance of the action, where the liability is several as well as joint, so that it may proceed separately against the representative of the decedent and against the surviving defendant or defendants, it was held that on the death of one of several joint debtors, his debt at law was discharged and his estate was only liable in equity when the plaintiff was unable to collect the debt from the survivor or survivors because of want of property. Courts of equity took jurisdiction where the joint obligors were all principal debtors, to enforce the obligation against the representatives of the deceased, where it was equitably just that his estate should be made liable and unconscionable that it should be discharged, but where the deceased joint obligor was a mere surety or guarantor receiving no benefit from the obligation and having no interest therein except as surety or guarantor, equity refused to interfere.[133] Even now, an action on a joint agreement cannot be maintained against the executor of one of the persons jointly liable without first exhausting the remedy against the survivors,[134] except that where the action is on the equity side of the court, the representatives of a deceased defendant may be joined with a surviving defendant in an action on a joint liability.[135] Furthermore, the discharge of the survivor by virtue of the bar of the statute of limitations is insufficient, since it must be shown that collection cannot be enforced against the survivor, in that he is insolvent.[136] It must be alleged in the complaint that the survivor is insolvent or unable to pay.[137] This question will be more fully considered in connection with the abatement and revival of actions.

133 Richardson v. Draper, 87 N. Y. 337; American Copper Co. v. Lowther, 25 Misc. 441.

134 Matter of Robinson, 40 App. Div. 23.

135 Divine v. Duncan, 2 Abb. N. C. 328.

136 Matter of Dunn's Estate, 5 Dem. Surr. 124.

137 Barnes v. Seligman, 55 Hun, 339, 29 State Rep. 68; Barnes v. Brown, 130 N. Y. 372; First Nat. Bank of Jersey City v. Lenk, 32 State Rep. 191.

§ 424. Equity rules.

As the rules relating to joinder of parties are practically a re-enactment of the rules prevailing in equity, much help will be obtained by briefly considering such rules. The equity rules relating to parties were more elastic than the common law rules. The two leading principles adopted by courts of equity for determining the proper parties to a suit were, that the rights of no man should be finally decided in a court of justice, unless he himself was present or at least unless he had a full opportunity to appear and vindicate his rights, and that when a decision was made on any particular subject matter, the rights of all persons having interests immediately connected with that decision and affected by it, should be provided for as far as they could reasonably be.[138] Mr. Justice Story states that the general rule in relation to joinder of parties in equity does not seem to be founded on any positive and uniform principle and therefore does not admit of being expounded by the application of any universal theorem as a test.[139] The most important rule was that all persons materially interested in the event of the suit or in the subject matter, however numerous, should be made parties, either as plaintiffs or as defendants. Parties were classified either as proper parties or necessary parties. Necessary parties were those without whom the court would not proceed to any decree. There were, however, certain cases where persons otherwise necessary parties were not required to be joined as parties, as where all claims against such a person were waived, or where the persons interested disclaimed all interest in the controversy, or consented to the decree sought or where the interest of the persons was very small, or where the person was legally represented by another. The doctrine of representation was a wide departure from the common law rules. Under this doctrine, to be hereafter considered, the joinder of a person as a party is dispensed with, where he is represented by other persons whose interest is such that they will protect his rights. This doctrine applied to all complainants and defend-

138 Story's Eq. Pl., p. 67.
139 Story's Eq. Pl., p. 73.

ants and has been practically adopted in toto by the Codes. The "proper" parties in equity were persons interested in the controversy who could be made parties but who could be left out without preventing a decree. An example of proper parties are formal or nominal parties, such as persons who hold a mere naked legal title, or persons whose interests are separate. The real party in interest was required to sue, but where one who should be a co-complainant refused to join, it was permissible to make him a defendant. Misjoinder of parties or multifariousness consisted in the uniting in one action parties whose interests were several, merely to avoid the necessity of bringing separate actions. Equity laid down no general rules in regard to such matter, but the courts seemed to consider the circumstances of each case with reference to avoiding on one hand a multiplicity of suits, and on the other inconvenience and hardship to the defendants from being required to answer matters with which they have in great part no connection, and the complication and confusion of evidence.[140] Defendants could not be joined unless there was some community of interest between them in respect to the subject matter of the controversy, though each defendant was not required to be interested in the whole matter in controversy. The rule was that all joint owners, joint contractors and other persons having a community of interest in duties, claims or liabilities who might be affected by the decree, should be made parties.[141] This rule applied to joint tenants, tenants in common, and partners. In regard to the nature of the interest it is said that the interest may be, (1) legal or equitable; (2) a present, direct and immediate interest or a future, remote, fixed interest; (3) but that the frame of the bill may avoid the necessity of making a person a party, as where a particular claim is waived; (4) and that persons merely consequentially interested need not ordinarily be joined.[142]

The following persons were not required to be joined as parties to a bill in equity:

(1) A person between whom and the plaintiff there is

140 Cyc. Law Dict. 608, 609.
141 Story's Eq. Pl., p. 159.
142 Story's Eq. Pl. pp. 139, 140.

no proper privity or common interest, his liability, if any being to another person.

(2) Persons consequentially interested.

(3) Persons against whom claim is waived in the bill.

(4) A mere nominal or formal party.

(5) A person who claims under a paramount title.

(6) A person who has no interest in the suit and against whom, if brought to a hearing, no decree can be had.

(7) A person who is a mere witness.[143]

§ 425. Joinder in actions involving a trust.

The Code has not abrogated the rule in equity that in case of breach of trust, where no general rule or order of the court interferes, and where a contribution or recovery over may be had, all persons who should be before the court to enable it to render complete and final judgment, are necessary parties.[144] The general rule in cases of trusts is that in suits respecting the trust property brought either by or against the trustees, the beneficiaries as well as the trustees are necessary parties, and where the suit is by or against the beneficiaries, the trustees also are necessary parties, inasmuch as they have the legal interest. For a similar reason, all persons who have specific charges on trust property derived under the trust and appertaining to the due execution of it, are generally required to be made parties to suits respecting the due execution of the trust or touching their rights therein whenever the persons are definitely ascertained and the trust is of a limited nature.[145] If the action seeks to enforce a trust or to obtain relief recognizing and adopting the trust, all the beneficiaries must either unite as plaintiffs or be joined as defendants. Thus in an action against an elevated railroad for an injunction and damages to abutting property held in trust, the beneficiaries under the trust are proper parties.[146] In an action to enforce the performance of an express trust, the trustee is a necessary defendant, but where the action is brought in opposition to the

143 Story's Eq. Pl. pp. 210-212.

144 Sherman v. Parish, 53 N. Y. 483.

145 Story's Eq. Pl., pp. 191, 192.

146 Roberts v. New York El. R. Co., 12 Misc. 345, 67 State Rep. 386.

trust, the beneficiaries need not be joined. It is a familiar principle often invoked in cases of trust, that when a party having the power and charged with the duty to become a plaintiff and prosecute an action for a private remedy refuses to do so, another, or others, having a financial interest, actual, contingent, or remote, in the subject of the cause of action and in the relief, may bring an action making such party and the one against whom the relief is sought, parties defendant.[147]

(B) OF PLAINTIFFS.

§ 426. Proper plaintiffs.

All persons having an interest in the subject of the action and in obtaining the judgment demanded, (except as otherwise specially prescribed by the Code), may be joined as plaintiffs.[148] This Code rule permits the joinder of persons whose rights are legally several and in such respects changes the common law rule. The rule is one which has always been recognized in equity practice. It applies to persons who have a common though not a joint interest, and to legal as well as equitable actions. The interest must pertain both to the subject of the action and to the relief demanded. The phrase "subject of the action," would seem to be used as in other places in the Code, to mean the subject matter of the action which Mr. Pomeroy states, "describes the physical facts, and hence real and personal property, lands, chattels and the like in relation to which the subject is prosecuted."[149] This Code section takes for granted that there is but one cause of action. If there is more than one cause of action, the joinder of parties becomes unimportant as the real question is as to joinder of causes of action. The common law theory that a person could not be joined as a plaintiff unless he was interested in the whole of the recovery so that one judgment could be rendered for all the plaintiffs, has been superseded. The Codes do not require that the interest of those to be united as plaintiffs must be equal or the same. The interest in the sub-

147 Overton v. Village of Olean, 37 Hun, 47.
148 Code Civ. Proc. § 446.
149 Pom. Code Rem. p. 535.

ject of the action need not be a joint, equal, or even a common interest.[150]

On the other hand, plaintiffs having separate interests can not join in an action for relief unless there is a common object to be secured by the prosecution of the action so that a single judgment can be entered. In other words, several plaintiffs having distinct and independent claims against a defendant cannot join in a suit for the separate relief of each.[151] Thus several firms who have separately sold goods to the same purchaser on credit by reason of false representations made by him, who has conspired with others to purchase and defraud the sellers by disposing of the goods, cannot join to recover the damages sustained by each firm in the sale of its own goods.[152] In construing this Code provision, it has been said that it "does not embrace all actions for damages dependent upon different interests, and was not intended to produce such confusion; hence the exception in the section. In an action for partition, for illustration, where many may have an interest in the subject of the action they may be joined. In an action for damages only there is no subject of the action eo nomine as contradistinguished from the cause of action. The interest is not in any subject, but in the result. It is not to enforce any claim to specific property, real or personal, or to set aside a will or any written instrument, or in relation to a nuisance or to recover the possession of any tangible thing or to secure its appropriation, but merely for such compensation as may be awarded for injuries received, for something not in esse, but to be created by the verdict, if one be rendered in favor of the plaintiff."[153]

As an example of persons having an interest both in the subject of the action and the relief, it is held that two partners, only one of whom is a guest at an inn, can maintain an action sounding in tort against an innkeeper, as such, for the loss of goods which are the property of the firm.[154] So all the parties

150 Loomis v. Brown, 16 Barb. 325.

151 Murray v. Hay, 1 Barb. Ch. 59; Wood v. Perry, 1 Barb. 114; Hynes v. Farmers' Loan & Trust Co., 31 State Rep. 136.

152 Gray v. Rothschild, 48 Hun, 596.

153 Hynes v. Farmers' Loan & Trust Co., 31 State Rep. 136.

154 Needles v. Howard, 1 E. D. Smith, 54.

entitled to shares in one debt are properly joined as plaintiffs in suing for its recovery.[155] Likewise, owners of water-rights on a stream may unite to restrain another owner from using more water than he is entitled to.[156]

In this connection, it is well to again refer to the meaning of the term "necessary parties." The Code says persons having an interest in the subject of the action and in the relief sought, "may" be joined. But such persons are not, of course, necessary parties in the strict legal sense, i. e. that no judgment determining the issues can be rendered without their presence. However it seems that where a demurrer for defect of parties is interposed in an equitable action which has omitted as parties persons materially interested in the subject and the relief, the court will order such persons to be joined so as to settle in one action the entire controversy. Thus, in an action for an injunction and damages against an elevated railroad, all persons interested in the abutting property and in the relief sought should be joined.[157]

——**Joinder of real party in interest and representative.** The real party in interest may be joined when an action is brought by an executor or administrator, a trustee of an express trust, or a person expressly authorized by statute to sue. To illustrate, the rule is that where a fire insurance policy is made payable to a mortgagee of the property, as his interest may appear, the mortgagee is a proper plaintiff in an action thereon, inasmuch as he is the third person for whose benefit the contract was made. On the other hand, the mortgagor may sue as he is the person in whose name the contract is made for the benefit of another. Hence, an action may be brought by either the mortgagor or the mortgagee, and it is not necessary that both be joined as plaintiff,[158] though such a joinder is proper.[159] Likewise, the next of kin may join as

[155] Brett v. First Universalist Soc. of Brooklyn, 5 Hun, 149.

[156] Emery v. Erskine, 66 Barb. 9.

[157] Shepard v. Manhattan Ry Co., 117 N. Y. 442; Woodworth v. Brooklyn El. R. Co., 29 App. Div. 1.

[158] Hathaway v. Orient Ins. Co., 134 N. Y. 409; Carr v. Providence-Wash. Ins. Co., 38 Hun, 86; Woodward v. Republic Fire Ins. Co., 32 Hun, 365; Roussel v. St. Nicholas Ins. Co., 41 Super. Ct. (9 J. & S.) 279.

[159] Winne v. Niagara Fire Ins. Co., 91 N. Y. 185.

plaintiffs in an action by the administrator to recover property claimed to belong to the estate and to be accounted for to them,[160] and an action may be brought in the joint names of a special guardian and of the infant, where the infant has an interest in the subject of the action, though the guardian could sue alone.[161] So the legal owner may sue for damages to real estate without joining the holder of an equitable interest,[162] as where the trustees of an express trust who are vested with the legal title to premises sued for injury thereto, the beneficiaries in such case not being necessary parties.[163]

—— **In actions ex delicto.** The existence of a joint or joint and several right, determines the power to join persons as plaintiffs in an action based on a tort. At common law, where two or more persons are jointly entitled, they must in general join in the action, and though the interest is several, yet if the wrong complained of caused an entire joint damage, the persons may join or sever in the action, but where the damage as well as the interest is several, each party injured must, in that case, sue separately.[164] This common law rule requiring all the persons who sustain a common injury by a personal tort to unite in an action to recover damages, is not superseded by the Code provision, but where a personal tort has been inflicted on several, but no joint injury has been suffered or joint damages sustained, each of the injured persons must sue separately, as in case of an assault and battery, a libel or slander, a malicious prosecution, etc.[165] As illustrating this rule, Mr. Chitty says: "Therefore, several parties cannot, in general, sue jointly for injuries to the person, as for slander, battery, or false imprisonment of both, and each must bring a separate action. In these cases the wrong done to

160 Peck v. Richardson, 12 Misc. 310, 67 State Rep. 810.

161 Lent v. New York & M. Ry. Co., 55 Hun, 180, 28 State Rep. 82.

162 Korn v. New York El. R. Co., 37 State Rep. 630.

163 Roberts v. New York El. R. Co., 155 N. Y. 31.

164 1 Ch. Pl. (16th Ed.) 73, 74.

165 The words "Your boys stole my corn," gives a separate right of action to one of the boys. Maybee v. Fisk, 42 Barb. 326.

The fact that there are other occupants of a house referred to as disorderly does not preclude the lessee from maintaining an action for libel. McClean v. New York Press Co., 46 State Rep. 706.

one person cannot in law be to the prejudice of the other; nor is there any criterion by which an entire sum can be awarded to them for damages. But partners in trade may join in an action for slanderous words spoken, or a libel published concerning them in the way of their joint business, without showing the proportion of their respective shares. * * * A husband and wife may sue jointly for a malicious prosecution and imprisonment of both, or the husband may sue alone. And two persons may jointly sue for a malicious arrest of both in an action brought without reasonable cause, if it be laid as special damage that they jointly incurred an expense in procuring their liberation. For in these instances there is an entirety of interest, or a joint damage resulting from the tort.'"[166]

In subsequent chapters discussing actions relating to real property, the question will be fully considered as to who are the proper or necessary plaintiffs in such actions.

§ 427. Necessary plaintiffs.

Persons united in interest, (except as otherwise specially prescribed in the Code), must be joined as plaintiffs,[167] but if

[166] Id.

[167] Code Civ. Proc. § 448.

As an example of where "otherwise specifically prescribed in the Code," section 1945 provides that in an action against one or more persons, engaged, as a joint-stock association, partnership, or otherwise, in the periodical transportation of passengers or property, an objection, to any of the proceedings, cannot be taken by a person properly made a defendant, on the ground that the plaintiff has failed to join with him a person so jointly engaged, unless the persons so engaged have, at least thirty days before the commencement of the action, filed in the clerk's office of each county, in which they transport passengers or property, a statement, showing the names of all of them. So, in relation to the rule that defendants united in interest must be joined, section 1946 provides that where, for any cause, two or more partners have not been joined as defendants in an action upon a partnership liability, and final judgment has been taken against the persons made defendants therein, the plaintiff, if the judgment remains unsatisfied, may maintain a separate action upon the same demand, against each omitted partner, setting forth in the complaint the facts specified in this section, as well as the facts constituting his cause of action upon the demand.

a person united in interest refuses to join as plaintiff, he may be made a party defendant.[168] In order to be united in interest, it seems that the relief must affect in some manner all the plaintiffs.[169] The test of unity of interest is said to be that joint connection with, or relation to, the subject matter which, by the established practice of the common law courts, will preclude a separate action.[170] Examples of persons united in interest are joint tenants, co-trustees, partners, joint owners or joint contractors simply, where in fact a separate judgment in favor of one of them would not be proper in the case stated in the complaint.[171] Thus one of two joint obligees in a bond cannot singly maintain an action for a breach of its condition.[172] So a contract with an association cannot be enforced by a member thereof alone, since a joint obligation.[173] But where a person is liable to two or more on a joint contract and settles with one for his demand, the others may sue for their part without joining the one settled with,[174] and where joint contractors have abandoned the work, leaving their co-contractors to finish it, they are not necessary parties to an action by the latter for a subsequent breach of the agreement.[175] As examples of persons not "united in interest" may be mentioned the owners of baggage which a common carrier failed to deliver, notwithstanding an agent of the owners, acting for all of them, had made the contract with the common carrier.[176]

The reason at common law for requiring a joinder of persons having a joint cause of action as plaintiffs, was that the defendant or defendants ought not to be vexed with two or more separate suits for the same cause of action.[177] The fol-

168 Code Civ. Proc. § 448.
169 Garner v. Wright, 28 How. Pr. 92, 24 How. Pr. 144.
170 Jones v. Felch, 16 Super. Ct. (3 Bosw.) 63.
171 Jones v. Felch, 16 Super. Ct. (3 Bosw.) 63.
172 Tinslar v. Malkin, 12 Wkly. Dig. 530.
173 Thompson v. Colonial Assur. Co., 60 App. Div. 325.
174 Lansing v. Bliss, 86 Hun, 205, 67 State Rep. 52.
175 Sullivan v. New York & Rosendale Cement Co., 119 N. Y. 348.
176 Spencer v. Wabash R. Co., 36 App. Div. 446.
177 Coster v. New York & E. R. Co., 13 Super. Ct. (6 Duer) 43.

lowing propositions are said to be well established as to the joinder of parties plaintiffs:

1. Where the covenant is, in its terms, several, but the legal interest of the covenantees is joint, they must join in suing upon the obligation.

2. Where the covenant is in its terms, expressly and positively joint, the covenantees must join in an action upon the covenant, although as between themselves their interest is several.

3. When the language of the covenant is capable of being so construed it must be taken to be joint or several, according to the interest of covenantees.[178]

It is doubtful, though, if the second propositon is the law inasmuch as the rule laid down by Chitty and followed by several New York decisions is that where the nature of the interest is several but the covenant is in terms joint, the persons holding such interest need not join,[179] and such rule has been applied to sustain separate actions on a certificate of corporate insurance made payable to several persons, "share and share alike," where the consideration was several.[180]

—— **Joinder of assignor and assignee.** Where an assignment is absolute, the assignee need not join the assignor as a party,[181] though there is a contemporaneous agreement which makes the assignment conditional or partial,[182] but where a thing in action has been transferred as collateral security, and the assignor sues thereon, the assignee is a necessary party,[183] and conversely where the assignee sues, the assignor is a necessary party.[184]

—— **In actions ex delicto.** The persons who must be joined as plaintiffs in actions ex delicto has been already considered

[178] Warner v. Ross, 9 Abb. N. C. 385.

[179] 1 Ch. Pl. 11; Hees v. Nellis, 1 Thomp. & C. 118. But see Warner v. Ross, 9 Abb. N. C. 385, which apparently holds the contrary.

[180] Emmeluth v. Home Benefit Ass'n, 122 N. Y. 130.

[181] Sheldon v. Wood, 15 Super. Ct. (2 Bosw.) 267.

[182] Durgin v. Ireland, 14 N. Y. (4 Kern.) 322.

[183] Ridgway v. Bacon, 72 Hun, 211.

[184] Western Bank v. Sherwood, 29 Barb. 383.

in connection with who "may" be joined as plaintiffs in such actions.[185]

(C) OF DEFENDANTS.

§ 428. Proper defendants.

The following persons "may" be joined as defendants:

1. All persons who have or claim an interest adverse to plaintiff or who are necessary parties to a complete determination and settlement of the question involved in the action.[186] Thus, a person seeking to enforce a lien may join as defendants all persons who assert any claim on the property, whether prior or subsequent.[187] On the other hand, an attorney should not be joined as a party in a suit to enjoin his clients from the prosecution of a suit, where no special circumstances exist,[188] and remaindermen are not proper parties to an action for damages, where no fee damages, but only past damages are demanded.[189] It will be noticed that the term "necessary parties" as used herein does not relate to necessary parties as already defined i. e. necessary to authorize the court to render any decision in the action.

2. Two or more persons severally liable on the same written instrument, including the parties to a bill of exchange or a promissory note, whether the action is brought on the instrument or by a party thereto to recover against other parties liable over to him, may all or any of them be included as defendants in the same action at the option of the plaintiff.[190] This changes the common law rule that persons severally liable on contract cannot be joined.

3. If the consent of a person who ought to be joined as a plaintiff cannot be obtained, he may be made a defendant, the

185 Ante, § 426.

186 Code Civ. Proc. § 447.

187 City of Buffalo v. Yattan, Sheld. 483; Fowler v. Mutual Life Ins. Co., 28 Hun, 195.

188 Ely v. Lowenstein, 9 Abb. Pr., N. S., 37.

189 Knapp v. New York El. R. Co., 4 Misc. 408, 53 State Rep. 571.

190 Code Civ. Proc. § 454; Toucey v. Schell, 15 Misc. 350, 72 State Rep. 858.

reason therefor being stated in the complaint.[191] But where a person refuses to join as plaintiff and is thereupon made defendant, he and his co-defendants cannot insist after trial, that he be added as a party plaintiff.[192]

A person against whom plaintiff has a right to any final relief in his action against other principal defendants is properly made a party defendant.[193]

The test to determine whether two persons can be joined as defendants is said to be whether they have one connected interest centering in the point in issue, or one common point of litigation.[194] This language, however, is most often used in connection with the question of joinder of causes of action,[195] and its applicability where only one cause of action is set forth in the complaint is doubtful.

—— **Joinder of persons severally liable.** At common law, a joint action could not be brought against two or more severally bound by the same instrument, and on a joint and several covenant, the plaintiff must have sued all jointly or each separately,[196] but the Code provides that two or more persons severally liable on the same written instrument, including the parties to a bill of exchange or a promissory note, whether the action is brought on the instrument, or by a party thereto to recover against other parties liable over to him, may, all or any of them, be included as defendants in the same action, at the option of the plaintiff.[197] This provision applies to parties jointly and severally liable as well as to parties severally liable.[198] Thus the maker of a note and the executor of the indorser may be sued together[199] as may a surety of a lessee

191 Code Civ. Proc. § 448.

192 Schnaier v. Schmidt, 37 State Rep. 641.

193 Hammer v. Barnes, 26 How. Pr. 174.

194 Harris v. Elliott, 29 App. Div. 568.

195 Mahler v. Schmidt, 43 Hun, 512.

196 Estate of Britton, 15 State Rep. 445; Strong v. Wheaton, 38 Barb. 616.

197 Code Civ. Proc. § 454.

198 Cridler v. Curry, 66 Barb. 336.

199 A joint judgment cannot, however, be rendered. Churchill v. Trapp, 3 Abb. Pr. 306; Eaton v. Alger, 47 N. Y. 345.

and the lessee[200] or the surety of a lessor and the lessor,[201] or one maker of a note adding to his signature the word "surety" and the other makers.[202]

The instrument must be in writing,[203] and an administrator's bond is a written instrument, within the rule.[204] Every written agreement or undertaking upon which parties may become liable to an action is embraced,[205] but the word "obligation" is to be taken here not in its popular signification, as any act by which a person becomes bound, but in its legal sense of a bond, or writing in the nature of a bond.[206]

The liability must exist under the same written instrument. The Code provision does not apply where the instruments are separate,[207] though on the same paper,[208] but if the guarantor is a party to the written instrument such as a lease and therein guarantees the performance of the lessor's covenants, both may be joined in an action on the lease.[209]

It has been held that the Code provision is not confined in its operation to actions where defendants are severally liable for, or in respect to, the same demand or indebtedness,[210] but

200 Decker v. Gaylord, 8 Hun, 110.

201 Carman v. Plass, 23 N. Y. 286.

202 Hoyt v. Mead, 13 Hun, 327.

203 Spencer v. Wheelock, 11 N. Y. Leg. Obs. 329; Strong v. Wheaton, 38 Barb. 616.

204 Cridler v. Curry, 44 How. Pr. 345, 66 Barb. 336; Field v. Van Cott, 15 Abb. Pr., N. S., 349.

205 Brainard v. Jones, 11 How. Pr. 569.

206 Strong v. Wheaton, 38 Barb. 616.

207 Guaranty and lease separate. Roehr v. Liebmann, 9 App. Div. 247, 75 State Rep. 881, 3 Ann. Cas. 297. See, also, Spencer v. Wheelock, 11 N. Y. Leg. Obs. 329; Le Roy v. Shaw, 9 Super. Ct. (2 Duer) 626; Phalen v. Dingee, 4 E. D. Smith, 379.

208 S. bound himself by a sealed contract, and P., by a sealed instrument, written thereon, and of the same date, guaranteed his performance. Held, that the instruments were not one, but several contracts. De Ridder v. Schermerhorn, 10 Barb. 638; Allen v. Fosgate, 11 How. Pr. 218; overruling Enos v. Thomas, 4 How. Pr. 48; Tibbits v. Percy, 24 Barb. 39.

209 Carman v. Plass, 23 N. Y. 286.

210 Isear v. McMahon, 74 State Rep. 282, 16 Misc. 95, which allowed a single action against all the underwriters of an insurance policy, though none of them were liable for the entire insurance. See, also, Pom. Code Rem. pp. 468, 469.

a later case holds that the provision refers to contracts upon which parties are severally liable for "the whole amount," and does not authorize joining all the underwriters under a contract of insurance which makes each liable severally and not jointly, "each for his own part of the whole amount herein insured."[211]

—— **In actions ex delicto.** As a general rule, at common law, in actions in form ex delicto, for a tort committed by several, the plaintiff might sue any of them, but where the action related to real property, if such as to draw in question the title, all those jointly concerned were required to be joined, but where the act complained of consisted in a malfeasance, such as the erection of a nuisance on the land, their title could not come in question, and they were severally liable.[212] Actions ex delicto are to be divided into actions for injuries to the person and actions for injuries to property. The joinder of defendants in actions for injuries to property, will be discussed in subsequent chapters. In reference to the joinder of defendants in actions for injuries to the person, all persons whose liability is joint or joint and several may be joined. What constitutes a joint or joint and several liability for a tort has already been stated.[213] The rule is laid down that if in legal consideration the act complained of could not have been committed by several persons, and can only be considered the tort of the actual aggressor, or the distinct tort of each, a separate action against the actual wrongdoer only, or against each, must be brought.[214] It is said that therefore a joint action cannot be supported against two for slander or against several persons for bribery.[215] On the other hand, a joint action has been allowed against several libellers.[216]

[211] Straus v. Hoadley, 23 App. Div. 360.

[212] Low v. Mumford, 14 Johns. 426.

[213] Ante, §§ 422, 426.

[214] 1 Ch. Pl. (16th Ed.) 96, 97.

[215] 1 Ch. Pl. (16th Ed.) 96, 97.

[216] Thomas v. Rumsey, 6 Johns. 26 in which the court says: "It is not like the case of perjury, where the perjury of one is not the perjury of another, but the perjury is a separate act in each. But where several persons join in singing one and the same libelous song, it is

The common law rules relating to the joinder of tort feasors as defendants have not been changed by the Codes.

If a wrongdoer dies, a surviving wrongdoer cannot, in an action to recover damages, be joined with the representatives of his deceased associate.[217]

§ 429. Necessary defendants.

The persons who are united in interest, where not joined as plaintiffs, (except as otherwise specially prescribed by the Code), must be joined as defendants.[218] We have already considered who are "united in interest" as plaintiffs and the same rules apply to defendants.

Joint owners need not, however, be joined where their interest has been extinguished by payment or otherwise,[219] and persons not known to be joint contractors at the time of the making of the contract need not be joined as parties defendant, but may be treated as dormant partners.[220, 221]

—— **In actions ex delicto.** Persons jointly liable for a tort must be joined. Who are jointly liable for personal torts has already been considered while joint liability for injuries to property will be considered in subsequent chapters.

—— **Joint debtor act.** To obviate the delay which would be sometimes caused if an action against joint debtors could not proceed until all the joint debtors were made parties and served with process, the joint debtor act was passed which pro-

an entire offense, and one joint act done by them all. * * * The making and publishing a libel are matters susceptible of a joint concern and undertaking, as much as a trespass, or falsely and maliciously procuring another to be indicted. This is not like an action against several persons for speaking the same words. Such an action cannot be maintained, because the words of one are not the words of another. But with respect to libels, if one repeat and another write, and a third approve what is written, they are all makers of the libel, for all persons who concur, and show their assent or approbation to the doing of an unlawful act, are guilty."

217 De Agreda v. Mantel, 1 Abb. Pr. 130.

218 Code Civ. Proc. § 448.

219 Bishop v. Edmiston, 16 Abb. Pr. 466.

220, 221 Woodhouse v. Duncan, 106 N. Y. 527.

vides that when the complaint demands judgment for money against two or more defendants alleged to be jointly indebted on contract, plaintiff may proceed against the defendants actually served and final judgment may be rendered against all jointly indebted. This statutory provision will be treated of in connection with the chapter "Actions by or against joint debtors."

(D) EXCUSES FOR NON-JOINDER EITHER AS PLAINTIFF OR DEFENDANT.

§ 430. Excuses in equity.

The general rule in equity, subject to certain exceptions, was that all persons materially interested, either legally or beneficially, in the subject matter of a suit, should be parties to it, either as plaintiffs or as defendants, however numerous, so that there might be a complete decree binding them all.[222] This rule as to joinder of persons holding merely an equitable interest is in marked contrast to the rule which prevailed in courts of law that only persons directly and immediately interested in the subject matter of the suit and whose interests were of a strictly legal nature, should be made parties to it.[223]

Certain exceptions to this equity rule were recognized by way of excuse.

First, was the utter impracticability of making the persons parties, as where they were without the jurisdiction of the court and could not be reached by the process of the court.[224] Persons out of the jurisdiction could be dispensed with as parties when their interests would not be prejudiced by the decree, and when they were not indispensable to the just ascertainment of the merits of the case before the court.[225] So the fact that the character of a party is such as to deprive the court of jurisdiction of his person, is, equally with his nonresidence, sufficient excuse for proceeding without him, in a cause of equitable jurisdiction,[226] but it seems that it is no

222 Story's Eq. Pl. p. 68.
223 Story's Eq. Pl. p. 71.
224 Story's Eq. Pl. p. 79.
225 Story's Eq. Pl. p. 82.
226 Sippile v. Albites, 5 Abb. Pr., N. S., 76.

excuse for the omission of necessary defendants that they are foreign corporations and beyond the jurisdiction.[227]

Second, there was an exception when the persons interested were very numerous. Mr. Justice Story, in his work on equity pleading, enumerates three classes where this exception was applicable in equity: "First, where the question is one of a common or general interest and one or more sue or defend for the benefit of the whole; Second, where the parties form a voluntary association for public or private purposes and those who sue or defend may fairly be presumed to represent the rights and interests of the whole; Third, where the parties are very numerous and although they have or may have separate and distinct interests, yet it is impracticable to bring them all before the court."[228] The first and third classes are almost literally preserved by the Code. The second class is specifically provided for by the Code,[229] though it is also held that the general Code provision applies to actions by individual members of an unincorporated association, notwithstanding section 1919 of the Code provides that in such cases a suit may be brought by the president or treasurer thereof.[230]

§ 431. Code rule as to when one may sue or defend for all.

The Code provides that one or more may sue or defend for the benefit of all where (a) the question is one of a common or general interest of many persons, or where (b) the persons who might be made parties are very numerous and it may be impracticable to bring them all before the court.[231] It is seen that there are two separate and distinct cases enumerated in this provision. The first is where the question is one of a common or general interest of many persons. It is not necessary in this case that it be impracticable to bring all the parties before the court.[232] The second has nothing to do with the question of a common or general interest, but is based alone

227 Dinsmore v. Atlantic & P. R. Co., 46 How. Pr. 193.
228 Story's Eq. Pl. § 97.
229 Code Civ. Proc. § 1919.
230 Bloete v. Simon, 19 Abb. N. C. 88.
231 Code Civ. Proc. § 448.
232 McKenzie v. L'Amoureux, 11 Barb. 516.

on the fact that the parties are very numerous and that it may be impracticable to bring them all before the court. In the latter class privity of interest between the parties is not necessary, though a common right or interest generally exists. As an example of the first class, a case often cited in the books is that of a suit brought by a part of the crew of a privateer against prize agents for an account and their proportion of the prize money.[233] So one of four separate legatees may sue on behalf of himself and the others for an account,[234] and one of the four heirs and next of kin of a testator may sue in behalf of all to have the will adjudged void, since the heirs at law and next of kin have a common interest and not a joint interest in the question involved.[235] Likewise, if an act constituting a public nuisance is specially injurious to separate owners of real estate, they may sue to restrain the nuisance in their own behalf and on behalf of other owners of property similarly situated.[236] So an action against the directors of a corporation for waste of corporate funds may be brought by one or more shareholders in behalf of all, where the shareholders are numerous,[237] and one stockholder may sue in behalf of all to compel the corporation to pay dividends on the preferred stock.[238] Likewise, one judgment creditor may sue in behalf of all the creditors similarly situated to set aside fraudulent conveyances,[239] and one creditor may sue in behalf of all to compel an accounting by the executor of the debtor's estate.[240] So, the persons living, in whom an estate is vested subject only to the contingency that persons may be thereafter born who will have an interest therein, may sue or defend in behalf of the estate.[241]

233 Leigh v. Thomas, 2 Ves. Sr. 312; Story's Eq. Pl. p. 95.

234 McKenzie v. L'Amoureux, 11 Barb. 516.

235 Farnam v. Barnum, 2 How. Pr., N. S., 396.

236 Astor v. New York Arcade Ry. Co., 3 State Rep. 188; Goelet v. Metropolitan Transit Co., 48 Hun, 520, 15 State Rep. 936, 28 Wkly. Dig. 489.

237 Brinckerhoff v. Bostwick, 88 N. Y. 52.

238 Prouty v. Michigan Southern & N. I. R. Co., 1 Hun, 655.

239 Claflin v. Gordon, 39 Hun, 54.

240 Petree v. Lansing, 66 Barb. 357.

241 Kent v. Church of St. Michael, 136 N. Y. 10.

The rule is also often applied in actions by tax-payers to enjoin acts of a municipal corporation. In the absence of statutory authority therefor, a taxpayer has, as such, no right of action against a public officer to prevent waste of public property or the unlawful usurpation of power, nor to compel the restitution of public funds or property spoliated,[242] but such actions are now allowed by statute.[243]

As to who are "many persons," it is held that the holder of receiver's certificates may sue in behalf of himself and others similarly situated to have the certificates declared a first lien on the property, though there are only two other holders.[244] It is the character of the interest which controls rather than the number of persons.[245]

It should be kept in mind, however, that the rule that one or more may be sued in place of all, does not apply where the right, to assert or protect which the suit is brought, is not one which exists against them all; or where the obligation sought to be enforced is not common to all, as where suit is brought against one of the numerous holders of bonds sued by a corporation to cancel the bonds.[246]

The second class includes persons "very numerous" all of whom it may be impracticable to bring before the court. It is,

[242] Roosevelt v. Draper, 23 N. Y. 323.

[243] The first statute was L. 1872, c. 161 which was incorporated into Code Civ. Proc. § 1925 which is supplemented by L. 1881, c. 531 and by L. 1887, c. 673. The construction of these statutes will be considered in a subsequent chapter relating to actions by or against public corporations. For collection of cases relating to remedies of taxpayers, see 10 Abb. Cyc. Dig. 1129-1140.

[244] Judge Chester, in Hilton Bridge Const. Co. v. Foster, 26 Misc. 340, uses the following language: "The question presented is whether or not this is a common interest of 'many persons,' within the meaning of the section referred to. The term 'many,' is a very indefinite expression. While on the one hand most of the standard dictionaries interpret the word to mean 'numerous,' and 'multitudinous,' the same authorities recognize it as synonymous with 'several,' 'sundry,' 'various' and 'divers.' The Century Dictionary gives one definition of it, as 'being of a certain number, large or small.'"

See, also, McKenzie v. L'Amoureux, 11 Barb. 516.

[245] Farnam v. Barnum, 2 How. Pr., N. S., 396, 404.

[246] Reid v. Evergreens, 21 How. Pr. 319.

however, the impracticability of bringing all the persons before the court, and not the number of them, which furnishes the test in this class of cases.[247] Thus, where there is no common interest, it has been held that thirty-five persons are not too numerous to join as plaintiffs,[248] and it seems that the mere fact that thirty-five or forty persons are interested in an action for an accounting, does not authorize one of them to sue for all, unless it is impracticable to bring them all before the court.[249]

ART. V. BRINGING IN NEW PARTIES.

(A) METHODS OF BRINGING IN NEW PARTIES.

§ 432. An action having been commenced by making a certain person or persons plaintiff, and a certain person or persons defendant, the question as to the right and method of thereafter bringing in new parties arises. This presents itself in three distinct phases:

First, where a party "necessary" to the rendition of any judgment between the parties actually before the court, is omitted, either party may move to join such person either as co-plaintiff or as co-defendant, or the court may order such joinder of its own motion. This is called "bringing in necessary parties."

Second, where a person who is a "proper" party to an action is omitted, he may, in certain specified cases, move to be joined as a party. This is called "intervention."

Third, where a party loses his interest in the action by virtue of some event occurring after the commencement thereof, or where a claim is made by another person and a defendant stands indifferent as between the plaintiff and such other person, a substitution of such person as a party may be ordered. It is thus seen that the third division is further divisible into two separate classes. In the one, a substitution is sought be-

[247] Brainerd v. Bertram, 5 Abb. N. C. 102.

[248] Kirk v. Young, 2 Abb. Pr. 453.

[249] Bird v. Lanphear, 11 App. Div. 613, 76 State Rep. 623. Per Follett, J., who dissented. The point was not considered in the prevailing opinion.

cause of a transfer of interest or devolution of liability as regards an original party.[250] Substitution, as used in the former sense, relates to those persons who would not originally have been proper parties but who have become such by events occurring after the commencement of the action. This phase of substitution will be treated of in a chapter relating to abatement and revival of actions and special proceedings, as it is so closely interwoven with the proceedings to continue an action where some event has happened pending the action. The substitution or joinder of indemnitors in an action against a sheriff is governed by special Code provisions,[251] as is the substitution of the successor in office of a public officer,[252] and questions relating thereto will not be treated of in this chapter but will be considered in a chapter relating to "Actions by or against public officers."

In the other case, a substitution is asked for on the ground that a third person makes a demand against defendant for the same debt or property.[253] This is known as an "interpleader," and a motion therefor is generally used instead of an action of interpleader. The subject will be treated of hereafter.

The Code provision which authorizes the court, at any stage of the action, before or after judgment, in furtherance of justice, to add the name of a party[254] does not enlarge the Code provisions relating to the bringing in of new parties, but is governed by such provisions.[255]

(B) BRINGING IN NECESSARY PARTIES.

§ 433. Legal, equitable, and Code rule.

The effect of non-joinder of necessary defendants was entirely different in actions at law and in suits in equity. The rule in legal actions was that plaintiff could not be compelled

250 Code Civ. Proc. § 756.
251 Code Civ. Proc. §§ 1421 et seq.
252 Code Civ. Proc. § 1930.
253 Code Civ. Proc. § 820.
254 Code Civ. Proc. § 723.
255 Heffern v. Hunt, 8 App. Div. 585.

to sue anyone except whom he chose, and that if the necessary parties were not present, the defendant could plead in abatement whereupon the writ of plaintiff would be quashed. In a suit in equity the rule was different in that if necessary parties were not before the court it would cause them to be brought in and not dismiss the bill unless the party refused or neglected to include a person as a party as directed by the court, in which case the court in its discretion could dismiss the bill without prejudice to another action. The general rule which prevailed in equity that all persons within the jurisdiction of the court whose presence is necessary to the determination of the interests involved in the matters alleged, must be made parties so that a complete judgment in that respect may be the result,[256] and that the court would not proceed to a decree until all necessary parties were before the court, was preserved by the old Code,[257] and such Code provision has been re-enacted almost word for word in the present Code which provides that where a complete determination of the controversy cannot be had without the presence of other parties, the court must direct them to be brought in. The court may, however, determine the controversy as between the parties before it where it can do so without prejudice to the rights of others.[258] While the statute does not in terms prohibit the

[256] This includes the representatives of such of the persons as are dead. Empire State Sav. Bank v. Beard, 81 Hun, 184.

[257] Code Civ. Proc. § 122; Thacher v. Board Sup'rs of Steuben County, 21 Misc. 271.

[258] Code Civ. Proc. § 452.

Lienor a necessary party. Sturtevant v. Brewer, 17 Super. Ct. (4 Bosw.) 628.

A receiver of the defendant appointed pendente lite in another action may be brought in. Matter of Jacobson, 23 App. Div. 75.

Where defendants were sued as partners, and a witness called by them testified that he was a member of the firm, an order may be made on the trial directing plaintiff to make the witness a party defendant. Kearney v. Thompson, 18 Wkly. Dig. 433.

Where plaintiff seeks to reach assets which, if they exist at all, primarily belong to the personal representative of decedent, and are to be by him administered upon, he should be brought in as a party necessary to a complete determination. Duane v. Paige, 82 Hun, 139, 63 State Rep. 759, 31 N. Y. Supp. 310.

court from determining the controversy, unless all the necessary parties are brought in, that is impliedly commanded and is the established practice in all equitable actions.[259] The right to compel the bringing in of a third person, is not enlarged by the Code provision which authorizes the making a defendant of any person who claims an interest in the controversy adverse to plaintiff or who is necessary for the determination of a question involved therein.[260]

§ 434. Meaning of "complete determination of controversy."

The meaning of the Code phrase, "a complete determination of the controversy," as used in connection with the requirement that if such a determination cannot be had without the presence of other parties, the court must direct them to be brought in, means that where there are persons not parties, whose rights must be ascertained and settled before the rights of the parties to the suit can be determined, they must be brought in.[261] The basic principle underneath this Code provision is that the presence of the parties sought to be brought in is absolutely necessary in order that the action be determined.[262] To illustrate this rule, the court of appeals has said that "when a defendant is sued alone upon a joint contract, if he omits to set up the non-joinder of his co-contractor by demurrer or answer, judgment may pass against him alone, because judgment against one joint-contractor will not prejudice the other, but may relieve him from liability. The other branch of the rule would be illustrated by an equitable action brought for the cancellation of a mortgage, executed to two persons as mortgagees, in which only one of the mortgagees was made defendant. The court could not proceed to a decree for the plaintiff without the presence of the other mortgagee. The distinction is between those who are necessary parties and those who are proper parties mere-

259 Mahr v. Norwich Union Fire Ins. Soc., 127 N. Y. 452.

260 Chapman v. Forbes, 123 N. Y. 532.

261 McMahon v. Allen, 12 How. Pr. 39; Chapman v. Forbes, 123 N. Y. 532.

262 Sawyer v. Chambers, 11 Abb. Pr. 110; Green v. Milbank, 3 Abb. N. C. 138.

ly. When persons who are necessary parties are not joined, the court will not proceed until they are brought in. It will not render a fruitless judgment, nor will it undertake to decide a single right in the absence of persons who are entitled to be heard in respect to it, and who may be prejudiced by the decision."[263]

So where the court cannot definitely and correctly say what are the rights of the parties before it, in the subject matter of the suit, until the claims of others to it are determined, new parties will be required to be brought in. There are many cases in which a defendant may require other parties to be brought in so that the judgment of the court in the action may protect him against the claims of such other parties.[264]

§ 435. Proceedings to which statute applies.

In the case most often cited and quoted in connection with this Code provision,[265] decided by the court of appeals in 1890, the rule was reiterated that the provision applies only to equitable suits,[266] and it was held that an action for money had and received was a legal rather than an equitable action. An action cannot be converted into an equitable one by defendant interposing an equitable defense.[267] It was never intended to make it incumbent upon a plaintiff in an action at law to sue any other than the parties he should choose, but, on the other hand, there is some question as to whether, in a legal action, plaintiff cannot bring in an additional defendant, pursuant to section 723 of the Code which permits the adding of the name of a party.[268] It does not apply to special pro-

263 Osterhoudt v. Board Sup'rs of Ulster County, 98 N. Y. 239.

264 Sturtevant v. Brewer, 17 Super. Ct. (4 Bosw.) 628.

265 Chapman v. Forbes, 123 N. Y. 532.

266 See, also, Heffern v. Hunt, 8 App. Div. 585, 75 State Rep. 307, which construes section 723 of the Code in connection with section 452, but which the court refused to follow in Schun v. Brooklyn Heights R. Co., 81 N. Y. Supp. 859.

267 Webster v. Bond, 9 Hun, 437.

268 Heffern v. Hunt, 8 App. Div. 585, which holds that such a motion can not be granted is criticized in Schun v. Brooklyn Heights R. Co., 81 N. Y. Supp. 859 which refuses to follow the rule.

ceedings[269] nor where the controversy is submitted on an agreed case, unless the parties consent.[270]

§ 436. Test as to right to bring in a new defendant.

If the person sought to be made a party defendant could have demurred successfully on the ground of no cause of action, if made a defendant at the commencement of the action, plaintiff will not be compelled to add him as a party.[271]

§ 437. Duty of court to bring in new parties as mandatory.

It is held that the court is not bound to order the proper parties to be brought in but may dismiss the complaint without prejudice to the right to bring a new action.[272] It would seem that this section of the Code provides a summary remedy authorizing the retention of a cause and impliedly prohibiting its dismissal, irrespective of the question whether necessary parties have been joined.[273]

§ 438. Who may be brought in as new party.

A non-resident of the state, where a necessary party, may be brought in as well as a resident.[274] Likewise the court may require necessary defendants to be served with process, though they were named as parties but not brought in by actual service or appearance.[275] If the plaintiff in an action on a contract finds out after action is brought that there are other undisclosed principals, he may bring them in at such time.[276]

269 Steingoetter v. Board Canvassers of Erie County, 18 State Rep. 799.

270 Trustees of Hobart College v. Fitzhugh, 27 N. Y. 130.

271 Christman v. Thatcher, 48 Hun, 446, 16 State Rep. 306.

272 Knapp v. McGowan, 96 N. Y. 75; Empire State Sav. Bank v. Beard, 81 Hun, 184; Sherman v. Parish, 53 N. Y. 483. See the late case of Pope v. Manhattan Ry. Co., 80 N. Y. Supp. 316, where the question was as to the bringing in of a grantee.

273 For discussion of this view, see Pom. Code Rem. 481, 482.

274 Sturtevant v. Brewer, 9 Abb. Pr. 414.

275 Powell v. Finch, 12 Super. Ct. (5 Duer) 666.

276 Wylde v. Northern R. Co., 53 N. Y. 156.

§ 439. Who may move.

The Code provision does not specify who may move to bring in the additional parties but in practice the motion is made by either plaintiff or defendant, and oftentimes the court, of its own motion, orders the bringing in of new parties. Usually the plaintiff applies. A third person cannot apply but his remedy is governed by the second part of the section which relates to intervention.

§ 440. Effect of failure of parties to move.

The Code provides that the defendants, by omitting to take the objection of non-joinder of parties by demurrer or answer, are "deemed to have waived it."[277] Construing together such Code provision and the provision relating to bringing in of new parties, their meaning is that a defendant, by omitting to take the objection that there is a defect of parties by demurrer or answer, waives on his part any objection to the granting of relief on that ground, but when the granting of relief against him would prejudice the rights of others, and their rights cannot be saved by the judgment and the controversy cannot be completely determined without their presence, the court must direct them to be made parties before proceeding to judgment.[278] The duty rests on the court notwithstanding the parties before the court raise no objection,[279] but failure of defendant to set up such defect precludes him from insisting on such joinder.[280]

§ 441. Grounds for refusing.

The court will not order the bringing in of an additional defendant at the instance of the plaintiff, though he should orig-

[277] Osterhoudt v. Board Sup'rs of Ulster County, 98 N. Y. 239.

[278] Osterhoudt v. Board Sup'rs of Ulster County, 98 N. Y. 239.

[279] Tonnelle v. Hall, 3 Abb. Pr. 205; Waring v. Waring, 3 Abb. Pr. 246; Shaver v. Brainard, 29 Barb. 25; Lazarus v. Metropolitan El. Ry. Co., 69 Hun, 190, 53 State Rep. 31, 23 N. Y. Supp. 515.

[280] Continental Trust Co. v. Nobel, 10 Misc. 325, 63 State Rep. 187; Thompson v. New York El. R. Co., 16 App. Div. 449, 79 State Rep. 64; Duane v. Paige, 82 Hun, 139.

inally have been made a defendant, where the defendant does not object, and the adding of the party will in nowise affect plaintiff's rights.[281] Likewise, where the petition of third persons who seek to intervene as parties plaintiff, has been denied, it seems, a fortiori, that such persons will not be brought in as defendants on plaintiff's motion.[282] On the other hand, the court is not prevented from directing a person to be brought in as a party defendant by the fact that his non-joinder has been pleaded as a defense.[283]

—— **Bringing in new party to constitute cause of action.** Plaintiff cannot bring in a new party defendant when his right to recovery depends on the presence of such party, since such procedure would be equivalent to the commencement of a new action.[284]

§ 442. The motion.

The practice in case a party desires to bring in a new party, is for the former to ask for a stay and then make a motion at special term. Notice of the motion should be given to the defendants who have appeared, but need not be given to the person or persons sought to be joined.[285] The motion should seek leave to bring in a new party and to file a supplemental complaint and summons, and should be based on an affidavit stating the nature of the action, the parties, the reason why the party was not originally joined, and that the proposed party is a necessary party. On the motion, the merits of the controversy will not be considered.[286] If the motion is to bring in receivers of the defendant, the question will not be considered as to whether the receivers should not themselves bring the action.[287]

[281] Muller v. Wahler, 1 App. Div. 245, 72 State Rep. 622.
[282] Mooney v. New York El. R. Co., 13 App. Div. 380, 77 State Rep. 35.
[283] Smith v. Central Trust Co., 7 App. Div. 278.
[284] Newman v. Marvin, 12 Hun, 236; McMahon v. Allen, 12 How. Pr. 39.
[285] Ebbets v. Martine, 19 Hun, 294.
[286] Johnston v. Donvan, 106 N. Y. 269.
[287] Mahoney v. Adams, 29 App. Div. 629, 51 N. Y. Supp. 1082.

§ 443. Time for motion.

The motion to bring in new parties should be made as soon as possible after discovery of the facts, but may be made, in proper cases, even after trial. Thus in an action for negligence where the plaintiff discovers at the trial that the interests of the defendant are so interwoven with the interests of another corporation that the liability cannot be ascertained, the plaintiff is entitled, even after the trial, to bring in such other corporation as a party defendant.[288] A necessary party may be brought in at any stage of the cause,[289] but a joinder may be refused, in the discretion of the court, in case of laches.[290] But where an answer set up a defect of parties defendant, and some six months thereafter, defendant moved to bring in certain persons as parties defendant, it was held within the discretion of the trial court to determine that such delay was not fatal.[291]

§ 444. The order and proceedings thereafter.

If the court deems the party a necessary one for the determination of the cause, the procedure is for the court to direct him to be brought in and to order that the summons and complaint be amended. The court should not only direct that new parties be brought in, but it is necessary that there be an appropriate amendment or that they voluntarily appear.[292] The order may provide further for service of summons upon the new parties, and service of amended complaint upon parties already in, specifying in detail the proper proceedings to pursue; or the order may simply allow them to be brought in, and the necessary amendments to be made to the summons and

[288] Romanoski v. Union Ry. Co., 30 Misc. 830.

[289] Attorney-General v. City of New York, 10 Super. Ct. (3 Duer) 119.

[290] Where a receiver has been appointed upon the dissolution of a corporation, and he has given plaintiff, who has an action against the corporation, the notice under the statute to present his claim, and the latter fails to do so, and the assets have been practically all distributed, it is too late for plaintiff to apply to make the receiver a party to the action. Owen v. Homœopathic Mut. Life Ins. Co., 31 State Rep. 600.

[291] Hilton Bridge Const. Co. v. New York Cent. & H. R. R. Co., 84 Hun, 225, 65 State Rep. 669, 32 N. Y. Supp. 514.

[292] Hood v. Hood, 85 N. Y. 561.

complaint, leaving plaintiff to thereafter conduct his proceedings regularly, at his own peril.[293] If the motion is granted after trial, the order should direct that the summons and the complaint be amended, both as to parties and facts, and as so amended, be served on all of the defendants with leave to them to answer or demur, and a new notice of trial should be served, though the case may retain its place on the calendar.[294] A supplemental complaint and summons must then be served,[295] service being made the same as in case of an original summons.[296] The new defendant thereupon may answer or demur. After a defendant is brought in he has the same rights as other defendants.[297] Ordinarily the proceedings should be de novo. After a trial has been had before a referee, and new parties defendant are brought in by order of the court, it is beyond the power of the court to compel such new parties to accept the evidence already taken by the referee. Such parties have the right to be present when the witnesses are sworn and examined, and cannot be deprived of it.[298]

After the order is made, the court should refuse to proceed to a determination of the controversy, until the new parties are in fact brought in.[299]

§ 445. Conditions of order.

Conditions should not be imposed, where the bringing in of the party will require no change in the issues to be tried, but if defendants have demurred for nonjoinder, the costs thereof may be imposed as a condition.[300] So the condition may be imposed that the bringing in of a party after a direction for an interlocutory order has been made, shall in nowise affect the rulings already made.[301]

293 Walkenshaw v. Perzel, 32 How. Pr. 310.
294 Romanoski v. Union Ry. Co., 30 Misc. 830.
295 Code Civ. Proc. § 453.
296 Code Civ. Proc. § 453.
297 Ebbets v. Martine, 19 Hun, 294.
298 Wood v. Swift, 81 N. Y. 31. See, also, Jenkins v. Bisbee, 1 Edw. Ch. 377.
299 Mahr v. Norwich Union Fire Ins. Soc., 127 N. Y. 452.
300 Hand v. Burrows, 15 Hun, 481.
301 Kreischer v. Haven, 23 Wkly. Dig. 66.

(C) INTERVENTION OF THIRD PERSON.

§ 446. Definition.

Intervention in modern practice as well as in civil law, is the act by which a third person becomes a party in a suit pending between other persons.[302]

§ 447. Difference between intervention and substitution.

Substitution is because of matters occurring after the commencement of the action while the right to intervene must have existed at the time the action was commenced.[303] Furthermore, a substitution can be moved for only by a defendant while an intervention can only be sought by a third person.

§ 448. Power of courts.

Intervention was allowed in equity where third persons claimed an interest in the subject matter. In a common-law action, where a money judgment only was sought, a plaintiff had the right to make defendants only such persons as were directly liable upon the contract or cause of action sued upon, and he could not be compelled to bring in any other persons. There is no "inherent" power in the court to introduce a third party into the controversy against the objection of the plaintiff.[304] The old Code as originally enacted, made no specific provision in regard to the right of a third person to intervene, but by amendment intervention was allowed in actions for the recovery of real or personal property.[305] The present Code combines a provision in regard thereto with the provision relating to the bringing in of necessary parties, and enlarges the right.[306] Intervention is sometimes allowed on the ground that there is an inherent power in the court to grant the order to prevent the perpetration of a possible injustice.[307]

302 Cyc. Law Dict. 496.

303 Griswold v. Caldwell, 14 Misc. 299, 70 State Rep. 682.

304 Merchants' Nat. Bank v. Hagemeyer, 4 App. Div. 52.

305 Code Pro. § 122.

306 Code Civ. Proc. § 452.

307 Thus where a sheriff is sued in replevin for goods levied on, and he notifies the owners that the suit will be discontinued unless they

§ 449. Actions to which statute applies.

This Code provision is not limited to equitable actions, but applies as well to legal actions.[308] Under the old Code which provided that in an action for the recovery of real or personal property, a third person having an interest in the subject thereof, might intervene,[309] it was held that the statute did not extend to actions on express or implied contracts for the recovery of money.[310] No such limitation is, however, imposed by the present Code.

§ 450. Right to intervene as a plaintiff.

It seems that the Code provision does not authorize a person who claims an interest hostile to that of the plaintiff to be made a plaintiff, and it has been stated that the Code provision relates merely to persons who wish to intervene as defendants,[311] though intervention as a plaintiff has often been allowed. At any event, a co-partner of plaintiff will not be allowed to intervene, where the only issue is as to the amount due and there is no question of title involved.[312]

§ 451. Discretion of court.

The Code directs that where a person interested as specified, applies to the court to be made a party, it "must" direct him to be brought in by the proper amendment.[313] Hence, it is held that the right to intervene is absolute,[314] except where peti-

furnish indemnity, which they are unable to do, they may be allowed to intervene without requiring security for costs. Rosenberg v. Courtney, 8 Misc. 616.

308 Chapman v. Forbes, 123 N. Y. 532; Rosenberg v. Salomon, 144 N. Y. 92; Graves Elevator Co. v. Masonic Temple Ass'n, 85 Hun, 496.

309 Code Pro. § 122.

310 Judd v. Young, 7 How. Pr. 79; Tallman v. Hollister, 9 How. Pr. 508.

311 Union Trust Co. v. Boker, 26 Misc. 85.

312 Petition of Diaper, N. Y. Daily Reg., May 3, 1883, 5 Month. Law Bul. 55.

313 Code Civ. Proc. § 452.

314 Lawton v. Lawton, 54 Hun, 415, 27 State Rep. 302; Van Loan v. Squires, 51 Hun, 360.

tioner's interests are acquired after the filing of lis pendens.[315] Great liberality is shown in admitting parties who may be injuriously affected by the action or judgment.[316]

§ 452. Persons entitled to intervene.

It should be remembered that a person in order to be entitled to intervene, need not be a "necessary" party. It is sufficient that he be a "proper" party.

In some states any person having an interest in a pending litigation may intervene therein, but in New York the Code limits the right to intervene to a person not a party who has an interest (1) in the subject of the action or (2) in real property, the title to which may in any manner be affected by the judgment, or (3) in any real property for injury to which the complaint demands relief.[317]

First, interest in the "subject of the action" means interest in the "subject-matter."[318] The interest in the subject matter must be such that a judgment in the action will form an obstacle to any claim which a third person may make against defendants, which includes both a personal claim and one against property to be applied to the payment of a defendant's debts.[319] If the judgment will bind a third person, he should be allowed to intervene.[320] Notwithstanding that some of the courts have manifested a disposition to break away from the rule laid down in Chapman v. Forbes,[321] a recent case decided by the court of appeals, reiterates the rule therein laid down that the plaintiff in an action in which a money judgment only is sought and in which the title to no real, specific or tangible personal property is involved cannot be compelled, on the application of a third

315 Earle v. Hart, 20 Hun, 75; Bowers v. Denton, 83 N. Y. Supp. 942.

316 Matter of Mason, 12 Misc. 77.

317 Code Civ. Proc. § 452.

318 Merchants' Nat. Bank v. Hagemeyer, 4 App. Div. 52. For late cases, illustrating what constitutes an interest in the subject of the action, see Montague v. Jewelers & Tradesmen's Co., 44 App. Div. 224; Michaelis v. Towne, 51 App. Div. 466; Mertens v. Mertens, 84 N. Y. Supp. 352.

319 Merchants' Nat. Bank v. Hagemeyer, 4 App. Div. 52.

320 Sauer v. City of New York, 10 App. Div. 267.

321 Chapman v. Forbes, 123 N. Y. 532.

person, to join him as a defendant.[322] It seems that the amount of the petitioner's interest is immaterial.[323] As illustrating what does not constitute an interest in the subject of the action, it is held that a claim that the applicant is entitled to a part of the proceeds recoverable in an action on a policy of life insurance, the legal title being in plaintiff, does not constitute such an interest.[324] If the applicant will be in nowise injured in case the plaintiff recovers judgment in a common law action, he will not be allowed to intervene.[325] Even in equitable actions, senior mortgagees will not be allowed to intervene in an action to foreclose a junior mortgage, where they cannot be prejudiced by the proceedings.[326] One not yet a judgment creditor at the time notice of lis pendens was filed has no right to intervene,[327] and an indemnitor of a surety company sued on a bond given by it, is not entitled to intervene merely because of the indemnity.[328]

Second, interest in the title referred to means title to real estate.[329] Third, the words "or any real property for injury to which the complaint demands relief," were added by amendment in 1901.[330] The meaning thereof is plain and no judicial construction thereof has as yet appeared.

—— **Representative persons.** An assignee for benefit of creditors may intervene as a person having an interest in the subject of the action,[331] but an assignee in bankruptcy cannot intervene in an action against a bankrupt, unless he shows that he has some right to the property in question.[332] A receiver of

322 Bauer v. Dewey, 166 N. Y. 402, which reversed 56 App. Div. 67.

323 Schenck v. Ingraham, 5 Hun, 397.

324 Palmer v. Mutual Life Ins. Co., 55 Super. Ct. (23 J. & S.) 352. To same effect, see Bauer v. Dewey, 166 N. Y. 402.

325 Britton v. Bohde, 85 Hun, 449.

326 McHenry's Petition, 9 Abb. N. C. 256.

327 Carey v. Kieferdorf, 8 App. Div. 616, 40 N. Y. Supp. 941, 75 State Rep. 340.

328 Feinberg v. American Surety Co., 32 Misc. 755.

329 Merchants' Nat. Bank v. Hagemeyer, 4 App. Div. 52.

330 L. 1901, c. 512.

331 Klemnect v. Brown, N. Y. Daily Reg., Dec. 20, 1883; Merchants' Nat. Bank v. Hagemeyer, 4 App. Div. 52.

332 Gunther v. Greenfield, 8 Abb. Pr., N. S., 191.

a person sued has no such interest as will authorize him to intervene.[333]

—— **Person principally interested.** The persons really interested may intervene to protect their own interests when their interest is defended through a representative.[334] Intervention will usually be allowed where the moving party has a substantial interest while the nominal party has only a slight interest.[335] Thus a principal should be allowed to intervene where the surety is sued on a bond, but the principal has a personal defense on the ground of fraud in its procurement, inasmuch as he has a direct interest in the subject of the action, in that if judgment goes against the surety, the principal will be liable over to him, but can relieve himself from such liability if permitted to defend,[336] and the principal obligor who will be eventually liable may intervene in an action by his assignee against the sureties.[337] So parties in interest may intervene in a proceeding by the attorney-general to close up the business of an insurance company, on account of the insufficiency of its assets,[338] and third persons who were the debtors in an execution may intervene in an action against the sheriff to recover possession of property levied on by him,[339] as may judgment debtors whose goods have been levied on, where the sellers bring replevin.[340] But a preferred creditor cannot intervene in an action against an assignee for benefit of creditors, unless misconduct of the assignee is shown.[341]

—— **In action for partition.** The holder of a deficiency judgment after foreclosure, cannot intervene in an action to partition the land of the deceased mortgagor.[342]

[333] Honegger v. Wettstein, 94 N. Y. 252.

[334] Matter of Eddy's Estate, 10 Misc. 211.

[335] Graves Elevator Co. v. Masonic Temple Ass'n, 85 Hun, 496, 67 State Rep. 111, 33 N. Y. Supp. 362.

[336] Matter of Mason, 12 Misc. 77.

[337] Kinney v. Reid Ice Cream Co., 57 App. Div. 206.

[338] Attorney-General v. North America Life Ins. Co., 77 N. Y. 297. See, also, People v. Albany & V. R. Co., 77 N. Y. 232.

[339] Rosenberg v. Salomon, 144 N. Y. 92.

[340] Uhlfelder v. Tamsen, 18 Misc. 173, 75 State Rep. 844.

[341] Davies v. Fish, 47 Hun, 314, 28 Wkly. Dig. 240, 13 State Rep. 554.

[342] His remedy is to proceed to sell the lands of the decedent, if the personal estate is insufficient. Patterson v. McCunn, 17 Wkly. Dig. 186.

§ 453. Application.

The Code provision is applicable only where persons not sued make the application on their own behalf. The application is usually made by a motion on notice and affidavits, though intervention will not be refused merely because the application is by petition.[343] The motion papers or petition should show that the applicant has, as a matter of fact, an interest in the subject of the action. It is not sufficient to merely state that he is interested in the subject of the action without showing how he is interested.[344] If on information and belief, it must state the sources of information.[345]

—— **Time.** The time for motion has been said to be any time before final judgment,[346] and intervention has been allowed even after a remand from the court of appeals,[347] but an order should not be granted in such a case where the petitioner had knowledge previous to the appeal.[348] After judgment is rendered in a foreclosure suit, a purchaser of the property after judgment cannot intervene.[349]

§ 454. Terms of order.

It is now settled that the court cannot impose terms on granting the order. The contrary was decided in 1896 but the decision was reversed on appeal.[350] It is held, however, that a person may, by his conduct, preclude himself from asserting his right to be made a party as an absolute right, to be accorded him without terms or conditions, as where he, by his conduct, prevents plaintiff from ascertaining who are the necessary and proper parties to the action, and delays him in the ascertainment of his rights, and permits him to go to fruitless

343 Matter of Mason, 12 Misc. 77, State Rep. 674.

344 Palmer v. Mutual Life Ins. Co., 55 Super. Ct. (23 J. & S.) 352.

345 Honegger v. Wettstein, 94 N. Y. 252.

346 Hubbard v. Eames, 22 Barb. 597; Carswell v. Neville, 12 How. Pr. 445.

347 Hagmayer v. Alten, 41 App. Div. 487.

348 Brennan v. Hall, 42 State Rep. 919, 17 N. Y. Supp. 6.

349 Beebe v. Richmond Light, Heat & Power Co., 6 App. Div. 187, 75 State Rep. 397, 40 N. Y. Supp. 1013.

350 Uhlfelder v. Tamsen, 15 App. Div. 436, reversing 18 Misc. 173.

expense, as where he fails to record the instrument under which he claims an interest until after the commencement of the action.[351]

[351] Wall v. Beach, 20 App. Div. 480.

CHAPTER VI.

TIME OF COMMENCING ACTIONS.

ART. I. THE STATUTES.

§ 455. Limitations at common law.

At common law there was no limitation as to the time within which an action should be brought other than that created by the presumption of payment or by the adverse possession of realty. The rule was that a right never dies; actions ex contractu were subject to no limitation and actions ex delicto were subject only to the limitation created by the maxim actio personalis moritur cum persona.[1] The time for the commencement of personal actions was first regulated in England by the statute chapter 16 of 21, James I.[2]

1 19 Am. & Eng. Enc. Law, 145.
2 Green v. Disbrow, 79 N. Y. 1.

§ 456. Limitations in equity.

Laches in the pursuit of remedies was discountenanced in equity even before limitations of actions at law had been prescribed by legislative enactments. The original statute of James I did not apply, in terms, to suits in equity but courts of equity were regarded as within its spirit and meaning so that where remedies were concurrent at law and in equity the statutory limitation was applied to proceedings in equity as well as at law.[3] The time for commencing suits in equity in this state was regulated at an early day by statutes which, to a large extent, embodied the rules previously in force. It was provided that whenever there is a concurrent remedy in a court of equity and in a court of common law, time is as absolute a bar in equity as it is at law, and in such cases the limitation, as to actions at law, applies.[4] Bills "for relief" wherein equity had pe-

[3] In Hovenden v. Annesley, 2 Schoales & L. 607, Lord Chancellor Redesdale stated: "But it is said that courts of equity are not within the statutes of limitations. This is true in one respect. They are not within the words of the statutes because the words apply to particular legal remedies. But they are within the spirit and meaning of the statutes and have been always so considered. I think it is a mistake in point of language to say that courts of equity act merely by analogy to the statutes. They act in obedience to it; the statute of limitations applying itself to certain legal remedies for recovering the possession of lands, for recovering of debts, etc. Equity which in all cases follows the law, acts on legal titles and legal demands, according to matters of conscience which arise and which do not admit of the ordinary legal remedies. Nevertheless, in thus administering justice according to the means afforded by a court of equity, it follows the law. * * * I think, therefore, courts of equity are bound to yield obedience to the statute of limitations upon all legal titles and legal demands, and cannot act contrary to the spirit of its provisions. I think the statute must be taken virtually to include courts of equity, for when the legislature by statute limited the proceedings at law in certain cases, and provided no express limitations for proceedings in equity, it must be taken to have contemplated that equity followed the law, and, therefore, it must be taken to have virtually enacted, in the same cases, a limitation for courts of equity also."

[4] 2 Rev. St. p. 301, c. 49; Matter of Neilley, 95 N. Y. 382; Mann v. Fairchild, 3 Abb. App. Dec. 152, 2 Keyes, 106; Rundle v. Allison, 34 N. Y. 180; Burt v. Myers, 37 Hun, 277; Mills v. Mills, 48 Hun, 97, 15 State Rep. 589, 28 Wkly. Dig. 413; St. John v. Coates, 63 Hun, 460, 45

culiar and exclusive jurisdiction and the subject matter of which was not cognizable in the common law courts, were required to be brought within ten years[5] except that bills for relief on the ground of fraud were required to be filed within six years from the discovery of the fraud.[6] These rules are the rules in force today as to equitable remedies except that the Code of Civil Procedure amended the Code of Procedure by striking out the words "for relief" after the words "an action" so that the section as it now stands reads as follows: "An action, the limitation of which is not specially prescribed in this or the last title, must be commenced within ten years after the cause of action accrues."[7] Reiterating the present rule, limitations applicable to actions at law apply to causes of action which before the adoption of the Code of Procedure courts of law and equity had concurrent jurisdiction over, or, in other words, where the subject of the action was the same in both courts, and the remedy only was different.[8]

It should be noticed, however, that the ten year period of limitation fixed by statute is not, where a purely equitable remedy is invoked, equivalent to a legislative direction that no less period of delay shall bar the action on equitable principles.[9]

Whether the equitable doctrine of laches, as distinguished from the statute of limitations, now exists in this state, has been said to be open to serious doubt.[10]

§ 457. Local statutes.

Statutes definitely limiting the time for the commencement

State Rep. 431; Zweigle v. Hohman, 75 Hun, 377, 58 State Rep. 660; Yates v. Wing, 42 App. Div. 356; Ray v. Ray, 24 Misc. 155.

[5] 2 Rev. St. 301, §§ 50, 52.

[6] 2 Rev. St. 301, § 51. This section was embodied in Code Proc. § 91, subd. 6 which was amended by Code Civ. Proc. § 382, subd. 5 by substituting the words "to procure a judgment other than a sum of money" for "relief" and omitting the word "solely" in connection with the phrase "was solely cognizable" in equity.

[7] Code Civ. Proc. § 388.

[8] Butler v. Johnson, 111 N. Y. 204.

[9] Calhoun v. Millard, 121 N. Y. 69.

[10] Cox v. Stokes, 156 N. Y. 491. See, also, De Pierres v. Thorn, 17 Super. Ct. (4 Bosw.) 266, 289.

of civil actions are of early origin in our jurisprudence. Most of the American statutes are based on the statute of 21 James I c. 16 entitled "An act for limitation of actions and for avoiding suits at law." The statute of limitations embodied in the Code is in direct succession from this ancient statute and is its present day expression. Chapter four of the Code is entitled "Limitation of the time of enforcing a civil remedy."[11]

The word "action," as contained therein, is to be construed, when it is necessary so to do, as including a special proceeding, or any proceeding therein, or in an action.[12]

The scope of this chapter is co-extensive with the scope of said chapter of the Code.

—— **Cases not within the statute.** The provisions of the Code chapter relating to limitations apply, and constitute the only rules of limitation applicable, to a civil action or special proceeding, except in one of the following cases:[13]

1. A case, where a different limitation is specially prescribed by law, or a shorter limitation is prescribed by the written contract of the parties.[14] This exception applies, however, only to the "question of time" where a different period of limitation has been prescribed by a special statute or by contract. It does not prevent the general provisions of the Code chapter on limitations from applying to cases of special limitation.[15]

[11] Code Civ. Proc. §§ 362-415.

[12] Code Civ. Proc. § 414.

[13] Code Civ. Proc. § 414.

[14] As examples of special statutory provisions may be mentioned the following: Two years for action to recover damages for death by wrongful act. Code Civ. Proc. § 1902.

Ten years for actions by the people founded on the spoliation or other misappropriation of public property. Id. § 1973.

Twenty years for action for dower. Id. § 1596.

Five years for action to annul a marriage on the ground of physical incapacity. Id. § 1752.

Six months for action against estate of decedent after claim has been rejected. Id. § 1822.

One year for action to recover animal seized or damages for its seizure. Id. § 3107.

An action to recover money lost in betting on a game must be brought within three months. 1 Rev. St. 662, § 9.

[15] Hayden v. Pierce, 144 N. Y. 512, followed by Titus v. Poole, 145

2. A cause of action or a defense which accrued prior to July 1, 1848.

3. A case where the right to sue or proceed has accrued and proceedings are actually commenced within two years from the time the present Code went into effect. This provision does not, however, operate to extend the time for the application of the statute of limitations.[16] It includes not only statutory provisions, but judicial rules of law, e. g. that a foreign statute of limitations constitutes no defense here.[17]

4. A case where the time to commence an action had expired, when the present Code took effect.[18]

As stated before, these exceptions are not as broad as they seem at first glance. They are exceptions only to the sections of the chapter on limitations which fix the periods of time within which the various classes of actions specified are to be brought. In other words, the general rules laid down in the chapter on limitations other than those fixing a period of time are applicable in all cases without exception, according to their terms.[19]

The Code chapter as to limitations does not apply to an action to enforce the payment of a bill, note, or other evidence of debt, issued by a moneyed corporation, or issued or put in circulation as money.[20]

The statute of limitations does not apply to an express trust. Such rule is, however, subject to the qualifications (1) that no circumstances exist to raise a presumption from lapse of time of an extinguishment of the trust and (2) that no open denial or repudiation of the trust is brought home to the knowledge of the cestui que trust, which requires him to act as upon an asserted adverse title.[21] Furthermore, the rule that the statute

N. Y. 415. But see Hill v. Board Sup'rs of Rensselaer County, 119 N. Y. 344.

16 Viets v. Union Nat. Bank of Troy, 101 N. Y. 563, 574; Watson v. Forty-Second St. & G. St. Ferry R. Co., 93 N. Y. 522.

17 Clark v. Lake Shore & M. S. Ry. Co., 94 N. Y. 217.

18 Code Civ. Proc. § 414.

19 Hayden v. Pierce, 144 N. Y. 512; Titus v. Poole, 145 N. Y. 414.

20 Code Civ. Proc. § 393.

21 Hill v. McDonald, 58 Hun, 322.

Where an uncle being indebted to his nephew in a certain sum, wrote

of limitations does not run against a trust does not apply to persons receiving money in a fiduciary capacity who are sometimes denominated trustees ex malofficio and trustees de son tort.[22] Thus it does not apply to the trust arising out of an agency[23] or to an attorney[24] or to administrators and executors.[25] Merely calling an executor or other person a trustee does not make him such.[26] Likewise, when a person takes possession of property in his own name and is afterward by matter of evidence, or by construction of law, changed into a trustee, lapse of time may be pleaded in bar.[27] The trusts intended not to be reached or affected by the statute of limitations, are those technical and continuing trusts which are not at all cognizable at law, but fall within the proper, peculiar, and exclusive jurisdiction of a court of equity.[28]

—— **Applicability of statute to defenses and counterclaims.** Statutes of limitation, strictly speaking, apply to actions only and not to defenses, but are applied to the latter by the Code provision that a cause of action on which an action cannot be maintained cannot be effectually interposed as a defense or counterclaim.[29] But it has been held in an action for an accounting and settlement between partners, that a counterclaim

to him recognizing the indebtedness and saying that he would keep the money until he deemed him capable of taking care of it, the money being in the bank, and he agreeing not to interfere with it meanwhile, which was assented to by the nephew, a trust was thereby created and the case taken out of the limitation upon an action to recover a contract debt. Hamer v. Sidway, 124 N. Y. 538.

[22] Brown v. Brown, 83 Hun, 160.

[23] Matter of Waite, 43 App. Div. 296; Budd v. Walker, 113 N. Y. 637; Mills v. Mills, 115 N. Y. 80, 86.

[24] Stafford v. Richardson, 15 Wend. 302.

[25] Matter of Nicholls, 23 Abb. N. C. 479.

[26] Matter of Smith's Estate, 66 App. Div. 340; Matter of Hawley, 104 N. Y. 250.

[27] Pierson v. McCurdy, 33 Hun, 520.

[28] Kane v. Bloodgood, 7 Johns. Ch. 90. This is a leading case in which the opinion was rendered by Chancellor Kent.

[29] Code Civ. Proc. § 397.

Termination of action by dismissal, discontinuance or death, as affecting limitations applicable to defense or counterclaim, see Code Civ. Proc. § 412 (post, p. 513).

for damages for breach of the partnership agreement may be asserted though the breach did not occur within six years, the rights of both the parties being under the partnership agreement, and the action being in equity.[30] Likewise, it has been held that where an action is brought on a note and defendant counterclaims for a breach of warranty in connection with the transaction in which the note was given, that plaintiff cannot set up the statute of limitations as a bar to the recovery though he might have relied on the statute had defendant commenced an action upon the warranty.[31]

§ 458. Nature and effect of statutes.

As often stated, the statute of limitations is "a shield and not a weapon of offense." In other words, the statutory provisions usually operate only on the remedy. They do not afford a presumption of payment. The liability of the debtor is not affected. The law merely deprives the creditor of the right to enforce payment in the courts.[32] It is for this reason that courts uniformly hold that statutes of limitation do not impair the obligation of contracts.[33] The debt is still recognized by the law as a good and valuable consideration for any subsequent promise or undertaking or transfer of property.[34]

There is one case in which the statute creates a conclusive presumption of payment from lapse of time and that is the case of a judgment or decree for the payment of money.[35] The acquisition of title to property by adverse possession involves a different question.[36]

[30] Campbell v. Hughes, 73 Hun, 14, 57 State Rep. 120.

[31] Maders v. Lawrence, 49 Hun, 360.

The statute of limitations is not a bar to a counterclaim for damages arising out of the partial failure of the plaintiff to perform the contract which is the foundation of his own right of recovery in the action, although the answer setting up the counterclaim was not served until after the lapse of the time limited by the statute for its enforcement as an independent cause of action. Herbert v. Dey, 15 Abb. N. C. 172, 33 Hun, 461.

[32] Hulbert v. Clark, 128 N. Y. 295.

[33] Johnson v. Albany & S. R. Co., 54 N. Y. 416. See post, § 460.

[34] Hulbert v. Clark, 57 Hun, 558.

[35] Code Civ. Proc. § 376. See, also, post, p. 466.

[36] See post, p. 460.

To illustrate the general rule that the remedy and not the debt is extinguished, it has been held that although a corporation might have pleaded the statute as a defense to claims of creditors, yet where it failed to do so, and judgment was rendered against it, the statute of limitations does not bar the receiver thereof from forthwith recovering against the directors.[37] So the maker of a note cannot recover choses in action pledged as security for its payment after action on the note is barred by the statute. The principal debt is not extinguished by operation of the statute of limitations.[38] Likewise an attorney's lien on funds in his possession continues after the debt has become barred by the statute.[39] So the right of an executor to a lien on a legacy in his possession for an amount due from the legatee to the testator is not affected by the fact that the debt is barred by the statute of limitations.[40]

—— **As distinguished from limitations under statutes giving rights of action.** Where a statute gives a right of action if suit is brought within a specified time, the limitation is on the right sought to be enforced and not on the remedy.[41]

—— **As distinguished from limitations by contract.** Parties to a contract may provide for shorter limitation to actions thereon than that fixed by statute of limitations.[42] Such a provision, however, affects the right and not the remedy,[43] and the limitation is not subject to the general rules governing the construction and operation of statutes of limitation.[44]

—— **As distinguished from presumption of payment.** It was a rule of the common law that the payment of a bond or spe-

[37] Van Cott v. Van Brunt, 2 Abb. N. C. 283.

[38] Jones v. Merchants' Bank of Albany, 29 Super. Ct. (6 Rob.) 162.

[39] Maxwell v. Cottle, 72 Hun, 529.

[40] Rogers v. Murdock, 45 Hun, 30, 9 State Rep. 660, 26 Wkly. Dig. 454.

[41] Hill v. Board Sup'rs of Rensselaer County, 119 N. Y. 344; Palen v. Johnson, 50 N. Y. 49.

[42] Code Civ. Proc. § 414, subd. 1; Better v. Prudential Ins. Co., 16 Daly, 344, 32 State Rep. 686, 11 N. Y. Supp. 70.

The most frequent use of a short limitation clause is found in policies of insurance.

[43] Hudson v. Bishop, 35 Fed. 820.

[44] 19 Am. & Eng. Enc. Law, 149.

cialty, would be presumed after the lapse of twenty years from the time it became due, in the absence of evidence explaining the delay, although there was no statute bar. The rule is said to have begun in courts of equity but from an early time it was recognized by courts of law. In this state it was frequently applied prior to any statute provision on the subject and in connection with other circumstances the presumption was allowed to prevail within the period of twenty years.[45] This common law presumption is, however, rebuttable. Evidence is admissible to show the fact of non-payment. The burden of proof is merely shifted to plaintiff. The evidence may be sufficient to rebut the presumption of payment though it would be of no effect as against the statute of limitations.[46]

The Code, however, provides for a conclusive presumption of payment of a final judgment or decree for a sum of money, or directing the payment of a sum of money, rendered in a court of record within the United States, or elsewhere, or a justice's judgment docketed with the county clerk pursuant to the statute, after the expiration of twenty years from the time when the party recovering it was first entitled to a mandate to enforce it, unless there is a part payment or acknowledgment of the indebtedness in the meantime.[47] In construing this Code provision it has been said that "it is doubtless true that there may be presumptions of payment which are not statutes of limitation, but it does not follow that a presumption of payment created by statute may not constitute a statutory limitation of the time within which an action can be maintained."[48]

§ 459. What law governs.

Irrespective of statute, the rule is that the law of the forum governs in respect to remedies and hence the statute of limitations of this state is applicable to an action brought in this state by a non-resident.[49] The rule was, prior to the present

[45] Bean v. Tonnele, 94 N. Y. 381; Macauley v. Palmer, 25 State Rep. 969; Lyon v. Adde, 63 Barb. 89.

[46] Van Rensselaer v. Livingston, 12 Wend. 490.

[47] Code Civ. Proc. § 376. See post, p. 466.

[48] Gray v. Seeber, 53 Hun, 611.

[49] Hixson v. Rodbourn, 67 App. Div. 424.

Code, that a foreign statute of limitations was not pleadable in this state.[50] On grounds of state comity the legislature extended to non-resident debtors the benefit of the statute and it is now expressly provided by the Code[51] that where a cause of action, which does not involve the title to or possession of real property within the state, accrues against a person who is not then a resident of the state, an action cannot be brought thereon in a court of the state, against him or his personal representative, after the expiration of the time limited by the laws of his residence for bringing a like action, except by a resident of the state, and in one of the following cases:

1. Where the cause of action originally accrued in favor of a resident of the state.

2. Where, before the expiration of the time so limited, the person, in whose favor it originally accrued, was or became a resident of the state; or the cause of action was assigned to, and thereafter continuously owned by, a resident of the state.

In other words, if the statute of their own state or country as construed and enforced by their own courts, protect them, foreign debtors may leave their homes and bring "within the protecting aegis of our statute the protection which the home government gave them—nothing more."[52] So if, under the decisions of a sister state, there have been such acts done as amount to an acknowledgment of the debt, the cause of action will be saved from the operation of the statute. If the debt is not out-lawed in the home of the debtor, state comity, as evidenced by the provisions of the Code, will prevent its being outlawed in this state.[53] These provisions do not apply where defendant has resided continuously in this state immediately prior to the suit for a period of years sufficient to bar the action in this state.[54] Likewise, if a defendant at the time he leaves his home state or country has not acquired the protection of the statute of limitations of that state, he is not entitled

50 Miller v. Brenham, 68 N. Y. 83.
51 Code Civ. Proc. § 390.
52 Howe v. Welch, 3 How. Pr., N. S., 465.
53 Howe v. Welch, 3 How. Pr., N. S., 465.
54 Goldberg v. Lippmann, 6 Misc. 35, 55 State Rep. 512.

to its protection in this state.[55] Furthermore, if a defendant desires to rely on this provision, he must show that he is within the statute and that the exceptions do not apply.[56]

In 1902, the legislature further provided that where a cause of action arises outside the state, an action cannot be brought thereon in a court of this state after the expiration of the time limited by the laws of the state or country where the cause of action arose, except where the cause of action originally accrued in favor of a resident of this state.[57]

§ 460. Constitutionality of statutes.

Inasmuch as statutes of limitation affect the remedy only, such statutes may be enacted, or modified, by the legislature even in respect to previously existing debts, without infringing the constitutional provision relative to impairment of contracts.[58] A fortiori statutes limiting the time within which an action for personal injuries may be brought, are not unconstitutional because applicable to existing causes of action, as actions of tort are not within the protection of the constitutional provision.[59] It should be noticed, however, that an act amending the statute of limitations by shortening the time within which a certain class of actions may be brought, is unconstitutional as to an existing cause of action in which the shorter time had expired when the act took effect, where there is no provision allowing a reasonable time for the commencement of a new action. The fact that a period of over four months

[55] Taylor v. Syme, 17 App. Div. 517.

[56] Beer v. Simpson, 22 Civ. Proc. R. (Browne) 351.

[57] Code Civ. Proc. § 390a (L. 1902, c. 193). The act excepts from its operation any pending action or proceeding.

[58] Morse v. Goold, 11 N. Y. (1 Kern.) 281; Camp v. Hallanan, 42 Hun, 628, 4 State Rep. 625, 25 Wkly. Dig. 555.

See, also, Meigs v. Roberts, 162 N. Y. 371 which held that the provision of L. 1885, c. 448, making a comptroller's tax-deed conclusive evidence after the lapse of two years of the regularity of the proceedings, is in the nature of a statute of limitations which will bar an action of ejectment after the expiration of that period although the action is based upon the failure to publish a proper redemption notice.

[59] Guillotel v. City of New York, 55 How. Pr. 114; Dubois v. City of Kingston, 20 Hun, 500.

lapsed between the enactment and the date of the act taking effect, will not validate it.[60] As to what is reasonable, it has been held that a statute fixing the time for the commencement of an action on a cause then existing from a period without limitation to a few months after the passage of the act does not give a reasonable time and is invalid.[61] Two years has been held a reasonable time.[62] In opposition to the weight of authority in other states, it has been held in this state in a recent decision that though a reasonable time has intervened to commence actions between the passage of the act and the time when, by its terms, it is to go into effect, a reasonable time is not given unless such a time exists after the time the statute takes effect.[63]

The legislature, it seems, has power to give a remedy by action for a cause that has been barred by an existing statute,[64] though it has been held that a subsequent change in the statute whereby the time for suing is enlarged does not remove the bar of the statute where it has already run, in the absence of a special provision therefor.[65]

Statutes of limitation do not conflict with constitutional provisions prohibiting the taking of property without due process of law.[66]

§ 461. Retroactive effect of statute.

It is elementary that a statute capable of such construction, must be assumed to operate prospectively unless its terms in-

60 Gilbert v. Ackerman, 159 N. Y. 118; Slocum v. Stoddard, 7 Civ. Proc. R. (Browne) 240; Matter of Warner, 39 App. Div. 91.

61 "The question of what is a reasonable time must be answered in view of all the facts surrounding the passage of the act and of which a court would take judicial notice. The reasonable time is not to be decided with reference to the bare fact as to whether sufficient time were allowed for a swift individual to make out the legal papers and setting out at once, find and serve upon the defendant the process necessary to commence the action." Parmenter v. State, 135 N. Y. 154.

62 Matter of Warner, 39 App. Div. 91.

63 Gilbert v. Ackerman, 159 N. Y. 118.

64 Hulbert v. Clark, 128 N. Y. 295; People v. Starkweather, 42 Super. Ct. (10 J. & S.) 326; Matter of Latz's Estate, 33 Hun, 618, 622.

65 Matter of Warner, 39 App. Div. 91.

66 People v. Turner, 117 N. Y. 227.

dicate a different intent. Thus rule has been applied to amendments of statutes of limitations.[67] So a statute requiring a written acknowledgment of a right of action to rebut the presumption of payment arising from the lapse of twenty years, is prospective only, in the absence of words indicating a contrary intent.[68] The local authorities do not seem to be entirely harmonious on this question, however, as it has been held that a statute of limitations affects the remedy on contracts made before as well as those made after its passage unless it contains some provision saving prior contracts from its operation.[69] Furthermore, it has been said that former statutes affecting remedies are no further applicable than the saving clauses of the new statutes make them so.[70]

§ 462. Construction in general.

Statutes of limitation were formerly regarded as being designed to raise a presumption of payment or adjustment from the lapse of time, and were looked upon with great disfavor by the courts as constituting a hard and unconscionable defense. But this view, which was universally held at first, has been gradually modified so that, at the present time, statutes of limitation have come to be looked upon not merely as statutes of presumption, and, as such, to be treated with harshness and disfavor, but rather as being also statutes of repose, intended to afford security against stale demands when the circumstances, by reason of the obscuring effects of time, would be unfavorable to a just examination and decision. They are now almost universally conceded to have a two-fold foundation: in the first place, the actual probability that a debt, which

[67] Goillotel v. City of New York, 87 N. Y. 441; Belknap v. Sickles, 7 Daly, 249. L. 1876, c. 431, § 7, amending section 94, Code Proc., so as to include actions for injury to the person among those which must be brought within a year, was prospective only, and did not affect an existing cause of action.—Carpenter v. Shimer, 24 Hun, 464; Disher v. New York Cent. & H. R. R. Co., 12 Wkly. Dig. 277; Goillotel v. City of New York, 87 N. Y. 441.

[68] Van Rensselaer v. Livingston, 12 Wend. 490.

[69] Acker v. Acker, 81 N. Y. 143.

[70] Matter of Warner, 39 App. Div. 91.

has not been claimed for a long time, has been paid, and that this was the reason of the silence of the creditor; and, in the second place, the inexpediency and injustice of permitting a stale and neglected claim or debt, even if it has not been paid, to be set up and enforced after a long silence and acquiescence. Wherefore, whatever may have been the ancient prejudice against them, statutes of limitation are now quite generally regarded as just as essential to the general welfare and the wholesome administration of justice as statutes upon any other subject, and to be construed with the same favor to effect the legislative intent.

It is well settled that no exception to the statute of limitations can be claimed unless it is expressly mentioned in such statute,[71] and that an exception in the statute of limitations will not be extended by construction to all cases coming within the reasons of the exceptions, if not within the letter.[72]

§ 463. Bar against one remedy as barring other remedies.

The fact that one of the plaintiff's remedies is barred does not ordinarily affect his right to pursue the other remedies which are not barred.[73] For instance, the fact that the circumstances attending an original transaction were such that an action might have been maintained against defendant to whom a fraudulent conveyance had been made for money had and received, and that such claim is barred, does not prevent the maintenance of a creditor's suit.[74] So where a right of recovery exists on two separate grounds, the loss of one by lapse of time does not impair the other.[75]

—— **Bar of debt as affecting security.** Since the statute does not raise a presumption of payment but merely creates a bar

71 Fowler v. Wood, 78 Hun, 304; Bucklin v. Ford, 5 Barb. 393; Levy v. Newman, 130 N. Y. 11.

72 Sacia v. De Graaf, 1 Cow. 356.

73 Peirson v. Board Sup'rs of Wayne County, 155 N. Y. 105. But see People ex rel. N. Y. Loan & Imp. Co. v. Roberts, 157 N. Y. 70, which seems to hold that where a cause of action for a claim is barred, a summary remedy is also barred.

74 Weaver v. Haviland, 142 N. Y. 534.

75 Graham v. Luddington, 19 Hun, 246.

to the remedy by action, a debt secured by mortgage can be enforced by foreclosure after the expiration of six but before the expiration of twenty years from the time when the debt became due.[76] On the same theory, the fact that the cause of action on the security is barred does not necessarily preclude an action to recover the debt.[77] But if the statute has run against the debt secured by a mortgage, no personal judgment can be rendered against the defendants in a foreclosure suit where the statute of limitations is pleaded and has run against the debt but not against the mortgage.[78] The general rule deducible is that if the security for a debt is a lien on property, the remedy to enforce the lien is not barred because the remedy to enforce the debt is barred. It should be kept in mind, however, that this rule presupposes the existence of two different periods of limitation applicable to the two remedies. For example, an early case held that an action to enforce a vendor's lien for purchase money cannot be maintained after the statute has barred an action at law for the debt.[79] This holding was placed on the ground that the remedies were within the concurrent jurisdiction of law and equity and that hence the equitable remedy was barred in the same length of time as the legal remedy. This case has been followed by holdings that an attorney's lien upon a judgment is barred by the limitations upon his right of action for services,[80] and that where defendant received money from plaintiff under a promise that plaintiff should have a lien on property which defendant was about to purchase, the equitable right to the promised lien was lost as soon as the statute ran against the debt.[81]

[76] Hulbert v. Clark, 128 N. Y. 295; Gillette v. Smith, 18 Hun, 10; Pratt v. Huggins, 29 Barb. 277; Dinniny v. Gavin, 4 App. Div. 298.

[77] Fowler v. Wood, 60 State Rep. 176, 78 Hun, 304.

[78] Hulbert v. Clark, 57 Hun, 558, 33 State Rep. 354, 19 Civ. Proc. R. (Browne) 177, 11 N. Y. Supp. 417.

[79] Although it is of equitable cognizance, the debt is the cause of action; and the debt, and not the equitable lien, is also the principle and fundamental subject-matter. Borst v. Corey, 15 N. Y. 505.

[80] Reavy v. Clark, 18 Civ. Proc. R. (Browne) 272, 30 State Rep. 535.

[81] Ray v. Ray, 24 Misc. 155.

§ 464. Computation of time.

The periods of limitation, except as otherwise specially prescribed, must be computed from the time of the accruing of the right to relief by action, special proceeding, defense, or otherwise as the case requires, to the time when the claim to that relief is actually interposed by the party, as a plaintiff or a defendant, in the particular action or special proceeding.[82] The rules relating to the mode of computing time are general in their application[83] and will be considered in a subsequent chapter.[84] Suffice it to say in this connection that the former rule for computing the time in which an action may be brought, i. e., to exclude the first day upon which it might have been brought,[85] has been changed by the statutory construction act which, though it does not change said rule for the computation of days, weeks or months, does, by implication, change the rule in regard to the computation of years.[86] Nevertheless, it seems that the statutory construction act which defines a year as twelve months cannot affect the reckoning of limitations in an action begun before its passage at a time when the statute provided that a year should be 365 days.[87]

§ 465. Extension of time by order.

A court or a judge is not authorized to extend the time fixed by law within which to commence an action.[88]

§ 466. Persons who may rely on the statute.

As a general rule, any person in privity with the claim of which enforcement is sought or any one who can fairly be said to stand in the place and stead of the person in whose favor

82 Code Civ. Proc. § 415.

83 L. 1892, c. 677, as amended L. 1894, c. 447. (Statutory Construction Act.)

84 See post, §§ 649-663.

85 Davison v. Budlong, 40 Hun, 245; Cornell v. Moulton, 3 Denio, 12; People v. New York Cent. R. Co., 28 Barb. 284.

86 Connecticut Nat. Bank v. Bayles, 163 N. Y. 561.

87 Hall v. Brennan, 140 N. Y. 409.

88 Code Civ. Proc. § 784.

the statute runs is entitled to plead the statute[89] For example, any person interested in an estate as heir, devisee, legatee, or creditor may, without the concurrence of the executor, interpose the statute of limitations as a defense to a claim brought against the estate.[90] So the trustees of an absent or absconding debtor may avail themselves of the statute to the same extent that the debtor might if the action were against him.[91] Likewise, where an assignee of a demand sues thereon and defendant interposes as a set-off a claim against the assignor, plaintiff may avail himself of the statute.[92] A corporation is a "person" which may avail itself of the statute as a defense.[93] So a deputy sheriff may rely on the statute available to the sheriff, as a bar to an action based on acts done by him in his official capacity.[94] A foreign corporation sued in this state can avail itself of the statute of limitations.[95]

§ 467. Against whom statute runs.

The general rule is that no laches can be imputed to sovereignty and that it is privileged from the statute of limitations.[96] The rule does not apply, however, to a claim which a sovereign takes as transferee after the statute has begun to run against the claim while in the hands of the transferror.[97]

[89] 19 Am. & Eng. Enc. Law, 184.

[90] Butler v. Johnson, 41 Hun, 206, 4 State Rep. 151; Raynor v. Gordon, 23 Hun, 264.

[91] Peck v. Randall's Trustees, 1 Johns. 165.

[92] Thompson v. Sickles, 46 Barb. 49.

[93] People v. Trinity Church, 22 N. Y. 44. Statutory construction law provides that the term "person" includes a corporation and a joint stock association. L. 1892, c. 677, § 5.

[94] Cumming v. Brown, 43 N. Y. 514.

[95] Olcott v. Tioga R. Co., 20 N. Y. 210; Boardman v. Lake Shore & M. S. Ry. Co., 84 N. Y. 157; Robeson v. Central R. Co., 76 Hun, 444.

But a corporation of another state sued here on our statute for causing death, may plead the short limitation peculiar to that statute (Code Civ. Proc., § 1902), for this is "a different limitation prescribed by law," (§ 414), and this takes the case of a foreign corporation out of the general rule by which (being deemed a nonresident under section 401) the ordinary limitations do not avail it. Londriggan v. New York & N. H. R. Co., 12 Abb. N. C. 273.

[96] People v. Van Rensselaer, 8 Barb. 189.

[97] United States v. White, 2 Hill, 59.

This common law rule has been to a considerable extent abrogated by statutes which limit the time in which actions may be brought on behalf of the people. As will be seen, title by adverse possession may be acquired even against the state.[98] So the Code provides that the limitations prescribed by the chapter on limitations as to limitations of actions other than for the recovery of real property apply alike to actions brought in the name of the people of the state, or for their benefit, and to actions by private persons.[99] The question as to trustees against whom the statute does not run has already been noticed.[100]

§ 468. Waiver of right to rely on statute.

Failure to specially plead the statute operates as a waiver.[101] So a part payment, acknowledgment, etc., may be considered as a waiver.[102] So there may be an express agreement to waive the lien which is valid if supported by a good consideration.[103] Such an agreement will not, however, estop defendant to plead the statute.[104]

An executor cited to account by a legatee does not waive his right to avail himself of the statute by subsequently proceeding to a final accounting.[105] The right to set up the statute may also be affected by an estoppel in pais.

98 See post, § 472.

99 Code Civ. Proc. § 389; People ex rel. N. Y. Loan & Imp. Co. v. Roberts, 157 N. Y. 70.

Const. art. 7, § 14 provides that neither the legislature, nor any person or persons acting in behalf of the state, shall audit or pay any claim barred by the statute of limitations as between individuals.

100 See ante, § 457.

101 See post, chapter on pleading.

102 See post, §§ 510-526.

103 Lathrop v. Woodward, 66 Hun, 635, 21 N. Y. Supp. 804; Gaylord v. Van Loan, 15 Wend. 310.

104 Shapley v. Abbott, 42 N. Y. 443.

105 House v. Agate, 3 Redf. Surr. 307.

ART. II. LIMITATIONS APPLICABLE TO PARTICULAR ACTIONS.

(A) ACTIONS FOR THE RECOVERY OF REAL PROPERTY.

§ 469. Historical.

There were, even in early times, numerous statutes adopted in England limiting the time within which an action could be brought on account of a disseisin of land, but these differed from the statutes of the present day in that, instead of naming a certain number of years before the institution of the action beyond which no disseisin could be alleged, they named a certain year back of which the pleader could not go.[106] The statute of James I. passed in 1623 is that on which the statutes in this state are modeled.

§ 470. Actions by people.

At common law, according to the maxim nullum tempus occurrit regi, the adverse possession of land belonging either to the United States or a state could not divest the government title.[107] This rule has been changed by the Code provision that the people of the state will not sue a person for or with respect to real property, or the issues or profits thereof, by reason of the right or title of the people to the same, unless (1) the cause of action accrued within forty years before the action is commenced, or (2) the people, or those from whom they claim, have received the rents and profits of the real property, or of some part thereof, within the same period of time.[108] This differs from the statute on the subject of limitations, applicable to actions of ejectment between individuals, in so far that it is not sufficient for the people to show a title which accrued to them more than forty years before their action is commenced, and that the defendant is in possession, but they must also make it appear that the land has been vacant within the prescribed period, or that within that time they have re-

106 2 Tiff. Mod. Law Real Prop. p. 996, which reviews history of the statutes.

107 2 Tiff. Mod. Law Real Prop. p. 1005.

108 Code Civ. Proc. § 362. Under 2 Rev. St. 292, § 1, the time was twenty years.

ceived rents and profits of it.[109] This statute was held applicable to an action by the people for the repeal of royal letters patent, granting land in the province of New York.[110] This right does not, as against the people, rest upon the doctrine of adverse possession as such, although it may be requisite to support it.[111] It has been held that there must be actual as distinguished from constructive possession to bar the action[112] though to the contrary is a holding that where premises in question were an unoccupied portion of a manorial grant, and defendants had regularly paid taxes therefor, and quit rents to the state until commuted in accordance with the statute, and had maintained men to protect the timber from trespassers, such possession was sufficient to give effect to the bar of the statute as to that part.[113] Furthermore, the possession of a defendant, to render the statute effectual to bar a recovery, must be hostile; otherwise the people are deemed to have received rents and profits of their unoccupied lands.[114] It may be said that the people have received the rents and profits, although the property be actually occupied by one who makes no direct return for the use, provided he holds by the permission of, or in subordination to, the title of the owners.[115]

—— **Grantees of the people.** Furthermore an action can not be brought for or with respect to real property, by a person claiming by virtue of letters patent or a grant, from the people of the state, unless it might have been maintained by the people, if the patent or grant had not been issued or made.[116]

—— **Action after annulling letters patent.** Where letters patent or a grant of real property issued or made by the people of the state are declared void by the determination of a

109 Genesee Valley Canal R. Co. v. Slaight, 49 Hun, 35.

110 People v. Clarke, 9 N. Y. (5 Seld.) 349.

111 Genesee Valley Canal R. Co. v. Slaight, 14 Civ. Proc. R. (Browne) 420, 17 State Rep. 241, 49 Hun, 35, 28 Wkly. Dig. 535, 1 N. Y. Supp. 554.

112 People v. Livingston, 8 Barb. 253.

113 People v. Van Rensselaer, 9 N. Y. (5 Seld.) 291. See People v. Trinity Church, 22 N. Y. 44.

114 Genesee Valley Canal R. Co. v. Slaight, 49 Hun, 35, 14 Civ. Proc. R. (Browne) 420, 17 State Rep. 241, 28 Wkly. Dig. 535.

115 People v. Arnold, 4 N. Y. (4 Comst.) 508.

116 Code Civ. Proc. § 363.

competent court, rendered upon an allegation of a fraudulent suggestion or concealment, or of a forfeiture, or mistake, or ignorance of a material fact, or wrongful detaining, or defective title, an action of ejectment, to recover the premises in question, may be commenced either by the people or by a subsequent patentee or grantee of the same premises, his heirs or assigns, within twenty years after the determination is made; but not after that period.[117]

§ 471. Action by party other than people.

An action to recover real property or the possession thereof cannot be maintained by a party other than the people, unless the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question, within twenty years before the commencement of the action.[118] This Code provision was intended to include only such cases as, prior to the enactment of the Code, were actions at law for the recovery of real property or its possession and triable by jury.[119] It includes only legal actions for the recovery of land or its possession, with or without damages for withholding it, and has no relation to any remedy administered only by courts of equity.[120] It applies to religious corporations.[121] Hence, an action by a vendor to foreclose a contract for the sale of lands, for failure to make payments, though a possible result may be to secure possession by the vendor, is not an action for the recovery of real property.[122] Furthermore, a prayer for recovery of possession as part of the relief sought does not necessarily make

117 Code Civ. Proc. § 364.

118 Code Civ. Proc. § 365.

And an action to recover premises in a city where the real property consists of a strip of land not exceeding six inches in width, on which there stands the exterior wall of a building erected partly on said strip and partly on the adjoining lot, where a building has been erected on land of plaintiff abutting on the wall, must be brought within one year. Code Civ. Proc. § 1499; Volz v. Steiner, 67 App. Div. 504.

119 Miner v. Beekman, 50 N. Y. 337.

120 Hubbell v. Sibley, 50 N. Y. 468.

121 Reformed Church v. Schoolcraft, 65 N. Y. 134.

122 Plet v. Willson, 134 N. Y. 139.

the action one to recover the possession of real property.[123] But an action to set aside a deed of land because of the incapacity of the grantor, is an action for the recovery of real property[124] as is a proceeding by beneficiaries under a will to set aside a conveyance of lands by the executor in violation of his trust and for his own benefit.[125]

An action for dower is barred in twenty years.[126]

An entry upon real property is not sufficient or valid as a claim, unless an action is commenced thereupon, within one year after the making thereof, and within twenty years after the time, when the right to make it descended or accrued.[127]

In an action to recover real property, or the possession thereof, the person who establishes a legal title to the premises is presumed to have been possessed thereof, within the time required by law; and the occupation of the premises, by another person, is deemed to have been under and in subordination to the legal title, unless the premises have been held and possessed adversely to the legal title, for twenty years before the commencement of the action.[128]

—— **Rule as applied to defenses.** A defense or counterclaim founded upon the title to real property, or to rents or services out of the same, is not effectual, unless the person making it, or under whose title it is made, or his ancestor, predecessor, or grantor, was seized or possessed of the premises in ques-

123 Miner v. Beekman, 50 N. Y. 337, which held that an action for an accounting brought by an alleged owner against a mortgagee in possession was not an action to recover real property.

124 Marvin v. Lewis, 61 Barb. 49.

125 People v. Open Board Stock Brokers' Bldg. Co., 92 N. Y. 98.

126 Code Civ. Proc. § 1596; Westfall v. Westfall, 16 Hun, 541.

127 Code Civ. Proc. § 367.

128 Code Civ. Proc. § 368.

It is not enough to show undisturbed possession for twenty years, since the presumption is that the possession is in subordination to the actual title, and the mere fact that the possessor holds a deed does not show that his entry was under it exclusive of any other right. Heller v. Cohen, 154 N. Y. 299.

See, also, Deering v. Riley, 38 App. Div. 164; De Lancey v. Piepgras, 138 N. Y. 26; Doherty v. Matsell, 119 N. Y. 646; Buttery v. Rome, W. & O. R. Co., 14 State Rep. 131; Clark v. Davis, 28 Abb. N. C. 135.

tion, within twenty years before the committing of the act, with respect to which it is made.[129]

§ 472. Adverse possession.

Many perplexing and difficult questions have arisen under the statutes as to the character of the possession of the land which one must have for the statutory period in order that the rights of the original owner may be barred. A possession for the statutory period which is sufficient to bar an action to recover the land is known as "adverse possession," and one who thus acquires rights in the land as against the former owner is said to acquire title by "adverse possession."[130] In determining the effect of this twenty year rule it need only be considered as a statute of limitation, and only with reference to the facts or conditions specified, as there is a clear distinction between statutes of limitation, as such, and their operation in transferring title to property where an adverse holder has acquired a prescriptive right of ownership. In the first case, the statute simply designates the conditions under which the remedy by action shall be asserted, and provides that it shall be barred unless such conditions exist, although their existence may, if open and continuous, ripen into title by prescription, while, in the second case, its effect in thus barring the remedy constitutes a rule of property in favor of the person against whom the remedy is to be asserted.[131] In other words, the effect of adverse possession in conferring title to real property, while a very important part of the law relating to real property, is not so intimately connected with questions of practice that it will be necessary in this connection to more than briefly refer to the Code provisions relating thereto which are embraced in the chapter relating to limitation of actions. An adverse possession, to be effectual, must be (1) hostile,[132] (2) act-

[129] Code Civ. Proc. § 366; Tyler v. Heidorn, 46 Barb. 439.

[130] 2 Tiff. Mod. Law Real Prop. p. 997.

[131] See 19 Am. & Eng. Enc. Law, 148.

[132] An adverse possession, to constitute a bar, must be an actual and hostile possession, and not a mere trespass. It involves an assumption of the right to the land in question, from the time it is alleged to have commenced, and a continued holding with the assertion of right. It

ual,[133] (3) visible and exclusive,[134] (4) continuous and uninterrupted,[135] and (5) under claim or color of title.[136]

—— **Under written instrument.** Our statutes have distinguished adverse possessions according to whether or not they are founded on a written instrument. The principal difference lies in the fact that a part possession under claim of the whole is sufficient as an adverse possession of the whole where based on a written instrument while in the other case the possession extends to only so much land as is actually occupied.

The Code provides that where the occupant, or those under whom he claims, entered into the possession of the premises, under claim of title, exclusive of any other right, founding the claim upon a written instrument, as being a conveyance of the premises in question, or upon the decree or judgment of a competent court; and there has been a continued occupation and possession of the premises, included in the instrument, decree,

must be visible and notorious, and exclude the exercise of ownership by the other party, and must be hostile in such sense as to indicate intent to occupy exclusively. Miller v. Platt, 12 Super. Ct. (5 Duer) 272.

Adverse possession depends upon the intention of the possessor to hold adversely and this intention must be shown. Berkowitz v. Brown, 3 Misc. 1, 53 State Rep. 625, 23 N. Y. Supp. 792.

While mutual ignorance of the rights of the parties may not change the situation in respect to their legal rights, it is an element in the conduct of the parties which may be taken into account in determining the adverse character of an occupation. American Bank Note Co. v. New York El. R. Co., 129 N. Y. 252.

[133] See post, p. 462, as to what constitutes an actual possession under our statutes.

[134] The possession must be both open, public, and notorious. Sturges v. Parkhurst, 50 Super. Ct. (18 J. & S.) 306.

Secret possession or one in subordination to right of true owner is insufficient.

[135] If the possession is abandoned or interrupted, the time must begin to run afresh. Bliss v. Johnson, 94 N. Y. 235.

Occupation must not only be hostile in its inception, but it must continue hostile, and at all times, during the required period of twenty years, challenge the right of the true owner in order to found title by adverse possession upon it. The entry must be strictly adverse to the title of the rightful owner, for if the first possession is by permission it is presumed to so continue until the contrary appears. Lewis v. New York & H. R. Co., 162 N. Y. 202.

[136] See post, p. 463.

or judgment, or of some part thereof, for twenty years, under the same claim; the premises so included are deemed to have been held adversely; except that where they consist of a tract, divided into lots, the possession of one lot is not deemed a possession of any other lot.[137] For the purpose of constituting an adverse possession, by a person claiming a title, founded upon a written instrument, or a judgment or decree, land is deemed to have been possessed and occupied in either of the following cases:

1. Where it has been usually cultivated or improved.[138]
2. Where it has been protected by a substantial inclosure.[139]

[137] Code Civ. Proc. § 369.

Color of title results from a deed given without authority by one acting in a fiduciary capacity, as an attorney (Munro v. Merchant, 28 N. Y. 9), or a trustee (Bradstreet v. Clarke, 12 Wend. 602) or the committee of a lunatic (Clapp v. Bromagham, 9 Cow. 530), or from an unauthorized corporate deed (Reformed Church v. Schoolcraft, 65 N. Y. 134).

A deed from a mere possessor is insufficient (Jackson v. Frost, 5 Cow. 346), but otherwise, of a deed from one who has previously conveyed away his title (Wilklow v. Lane, 37 Barb. 244), or a deed of the whole from a tenant in common.

A void tax deed, if fair on its face, is sufficient (Finlay v. Cook, 54 Barb. 9).

As to what constitutes color of title, see, also, Voight v. Meyer, 42 App. Div. 350; Sweetland v. Buell, 89 Hun, 543; Sands v. Hughes, 53 N. Y. 287; Pope v. Hanmer, 74 N. Y. 240; Davis v. Burroughs, 28 State Rep. 901; Berkowitz v. Brown, 3 Misc. 1; Kneller v. Lang, 63 Hun, 48; Abrams v. Rhoner, 44 Hun, 507.

[138] Code Civ. Proc. § 370. As to what constitutes cultivation and improvement, see New York Cent. & H. R. R. Co. v. Brennan, 12 App. Div. 103; Bliss v. Johnson, 94 N. Y. 235; Pope v. Hanmer, 8 Hun, 265; Wheeler v. Spinola, 54 N. Y. 377.

The "cultivation and improvement" intended by the statute is the ordinary cultivation and improvement of lands in the manner in which they are usually occupied, used, and enjoyed by farmers for agricultural purposes; by sowing, ploughing, and manuring, and by the erection of buildings, etc., which might add to their value. Reaping the fruits, without really doing anything to produce them, can scarcely be considered as cultivating; nor can the keeping up a fence already made, mowing the grass and cutting brush (with no proof that it was designed to improve the land), be considered an improvement within the meaning of the statute. Doolittle v. Tice, 41 Barb. 181.

[139] Code Civ. Proc. § 370, subd. 2.

3. Where, although not inclosed, it has been used for the supply of fuel, or of fencing timber, either for the purposes of husbandry, or for the ordinary use of the occupant.[140]

Where a known farm or a single lot has been partly improved, the portion of the farm or lot that has been left not cleared, or not inclosed, according to the usual course and custom of the adjoining country, is deemed to have been occupied for the same length of time, as the part improved and cultivated.[141]

—— **Under claim of title not written.** Where there has been an actual continued occupation of premises, under a claim of title, exclusive of any other right, but not founded upon a written instrument, or a judgment or decree, the premises so

Inclosure by fence is sufficient (Baker v. Oakwood, 123 N. Y. 16; Townshend v. Thomson, 60 Super. Ct. [28 J. & S.] 454) but not where it excludes the party claiming possession by reason of it and admits the other party (Selliman v. Paine, 16 State Rep. 324, 48 Hun, 619, 1 N. Y. Supp. 75). The fence need not be such as would prevent entry (Bolton v. Schriever, 49 Super. Ct. [17 J. & S.] 168) and a brush and pole fence is sufficient (Hill v. Edie, 49 Hun, 605, 1 N. Y. Supp. 480, 17 State Rep. 255).

There must be an intention to inclose, and a fence not on the line, and erected merely to prevent cattle from straying, is not within the statute (McFarlane v. Kerr, 23 Super. Ct. [10 Bosw.] 249; Yates v. Van De Bogert, 56 N. Y. 526; Barnes v. Light, 2 State Rep. 219). The inclosure must be of the land on the lines claimed, and not of it with other premises (Doolittle v. Tice, 41 Barb. 181).

There must be a real, substantial inclosure, an actual occupancy, a possessio pedis, which is definite, positive, and notorious, to constitute an adverse possession, when that is the only defense, and is to countervail the legal title. A "possession-fence," so called, made by felling trees, and lapping them one upon another, around the land is not sufficient.—Jackson v. Schoonmaker, 2 Johns. 230.

The property need not be fenced in on every side as natural boundaries may suffice.—Sanders v. Riedinger, 30 App. Div. 277; Trustees of Freeholders & Commonalty of Town of East Hampton v. Kirk, 84 N. Y. 215.

140 Code Civ. Proc. § 370, subd. 3; Northport Real Estate & Imp. Co. v. Hendrickson, 139 N. Y. 440; Price v. Brown, 101 N. Y. 669.

One cannot claim constructive possession because trees were cut for use elsewhere; no part of the tract being improved.—Mission of the Immaculate Virgin v. Cronin, 143 N. Y. 524.

141 Code Civ. Proc. § 370, subd. 4.

actually occupied, and no others, are deemed to have been held adversely.[142]

For the purpose of constituting an adverse possession, by a person claiming title, not founded upon a written instrument, or a judgment or decree, land is deemed to have been possessed and occupied in either of the following cases, and no others:

1. Where it has been protected by a substantial inclosure.[143]
2. Where it has been usually cultivated or improved.[144]

—— **Relation of landlord and tenant as affecting adverse possession.** Where the relation of landlord and tenant has existed between any persons, the possession of the tenant is deemed the possession of the landlord, until the expiration of twenty years after the termination of the tenancy; or, where there has been no written lease, until the expiration of twenty years after the last payment of rent; notwithstanding that the tenant has acquired another title, or has claimed to hold adversely to his landlord.[145]

§ 473. Death of person in possession.

The right of a person to the possession of real property is not impaired or affected, by a descent being cast in consequence

[142] Code Civ. Proc. § 371; Smith v. Reich, 80 Hun, 287; Jackson v. Warford, 7 Wend. 62.

[143] Code Civ. Proc. § 372, subd. 1.

[144] Code Civ. Proc. § 372, subd. 2.

Adverse possession need not, under Code Civ. Proc. § 372, be under color of title. Eldridge v. Kenning, 35 State Rep. 190, 59 Hun, 615, 12 N. Y. Supp. 693.

[145] Code Civ. Proc. § 373.

The effect of this provision is to prevent the running of a claim to an adverse possession in favor of a tenant for the period prescribed, whether he has acquired another title, or whether he has claimed to hold adversely. For the twenty years the landlord has the benefit and the protection of the statutory presumption, against the consequences of his fault, or mistake, or accident, and against the acts of his tenant. Where, however, the twenty years have expired since any payment of rent, the possession of the tenant becomes hostile and his subsequent grantee, under a warranty deed, holds adversely to the landlord.—Church v. Schoonmaker, 115 N. Y. 570. See, also, Whiting v. Edmunds, 94 N. Y. 309; Church v. Wright, 4 App. Div. 312; Bissing v. Smith, 85 Hun, 564, 66 State Rep. 796, 33 N. Y. Supp. 123.

of the death of a person in possession of the property.[146] This provision abolishes the rule of the common law as to descent cast.

§ 474. Personal disabilities extending time to sue.

The statute of limitations of James I. extended the period for bringing an action to recover land in case plaintiff was under disability at the time the action accrued in favor of (1) persons under 21 years, (2) femes covert, (3) persons non compos mentis, (4) persons imprisoned, and (5) persons "beyond the seas." Our statute provides that if a person who might maintain an action to recover real property, or the possession thereof, or make an entry, or interpose a defense or counterclaim, founded on the title to real property, or to rents or services out of the same, is, when his title first descends, or his cause of action or right of entry first accrues, either (1) within the age of twenty-one years, or[147] (2) insane,[148] or (3) imprisoned on a criminal charge or in execution upon conviction of a criminal offense for a term less than for life,[149] the time of such a disability is not a part of the time limited for commencing the action, or making the entry or interposing the defense or counterclaim, except that the time so limited cannot be extended more than ten years, after the disability ceases, or after the death of the person so disabled.[150]

[146] Code Civ. Proc. § 374.

[147] Code Civ. Proc. § 375, subd. 1.

[148] Code Civ. Proc. § 375, subd. 2.

[149] Code Civ. Proc. § 375, subd. 3. This rule applies to actions for dower. Code Civ. Proc. § 1596.

[150] Code Civ. Proc. § 375, subd. 4.

Since a remainderman, or reversioner, cannot enter during the continuance of the particular estate, for the purpose of taking possession, the statute does not commence running against him until after the determination of the particular estate. Jackson v. Schoonmaker, 4 Johns. 390; Jackson v. Sellick, 8 Johns. 202; Jackson v. Johnson, 5 Cow. 74; Grim v. Dyar, 10 Super. Ct. (3 Duer) 354; Randall v. Raab, 2 Abb. Pr. 307; Fogal v. Pirro, 23 Super Ct. (10 Bosw.) 100, 17 Abb. Pr. 113; Christie v. Gage, 71 N. Y. 189; Graham v. Luddington, 19 Hun, 246; Manolt v. Petrie, 65 How. Pr. 206; Fleming v. Burnham, 100 N. Y. 1.

A married woman is on the same footing as other persons. Clarke v. Gibbons, 83 N. Y. 107.

This ten year rule means that the disability shall not add more than ten years to the time limited after the disability has ended. Thus, in a case of infancy the extreme possible limitation is thirty-one years.[151]

(B) ACTIONS OTHER THAN FOR THE RECOVERY OF REAL PROPERTY.

§ 475. Twenty years.

Actions other than actions for the recovery of real property which may be brought within twenty years are the following:

1. Actions on final judgment or decree of court of record for sum of money or directing payment of money.[152]
2. An action to redeem from a mortgage.[153]
3. An action on a sealed instrument.[154]

—— **Actions based on final judgment or decree.** As before stated, there is a conclusive statutory presumption after twenty years that a final judgment or decree for money or directing the payment of money, has been paid and satisfied.[155] The statute previously applied to "every" judgment and decree but now it applies only to "final" judgments or decrees "for a sum of money or directing the payment of a sum of money," such as an award for property taken by a city for a street widening.[156] Decrees of courts of equity, other than for the payment of money, do not expire by reason of the passage of any number of years, and the question whether they will be enforced after a long time has elapsed, is one for the court to decide upon a

[151] A party is always entitled to twenty years in which to bring his action, and in case of a disability, to so much more as the period of disability would add, except that such addition must not be more than ten years after the termination of the disability. The words, "after the disability ceases," relate only to the extended time, and have no effect in any case to cut down or lessen the twenty years' limitation.—Howell v. Leavitt, 95 N. Y. 617.

[152] Code Civ. Proc. § 376.

[153] Code Civ. Proc. § 379.

[154] Code Civ. Proc. § 381.

[155] See ante, p. 446; Code Civ. Proc. § 376. As to acknowledgment or part payments as tolling the statute, see post, §§ 510 et seq.

[156] Donnelly v. City of Brooklyn, 121 N. Y. 9.

consideration of all the facts.[157] A decree of foreclosure where no judgment for a deficiency has been docketed[158] or a judgment for recovery of possession of realty for nonpayment of rent,[159] are not within the rule. So a finding of a referee in proceedings for leave to sell the real estate of an habitual drunkard as to the existence of a debt against his estate is not a judgment within the rule.[160]

It has been held that this twenty year statute relates only to the remedy by action—that it does not affect the remedy by execution.[161]

That this statute is also a statute of limitation so as to bar the remedy in twenty years, has been expressly decided.[162] But this statute is not considered a statute of limitation in so far as to bring it within the subsequent Code rules relating to the suspension, postponement and interruption of the statutes of limitation, as where the person liable dies.[163]

It is important to keep in mind, in connection herewith, the Code rule that an action on a judgment or decree of a court "not of record," except where a transcript of a judgment of a justice of the peace is filed with the county clerk as provided for by section 3017 of the Code, must be brought within six years.[164] In other words the twenty year rule, besides being in effect a statute of limitation, also raises a "conclusive" presumption of payment of "final" money judgments or decrees of "courts of record" and of justice's judgments filed with the county clerk; the six year rule applies to every judgment or decree of a court not of record, except justice's judgments filed with the county clerk, but does not raise a presumption of payment since only the remedy is barred.[165]

157 Wing v. De La Rionda, 34 State Rep. 267; Van Rensselaer v. Wright, 121 N. Y. 626.

158 Barnard v. Onderdonk, 98 N. Y. 158.

159 Van Rensselaer v. Wright, 121 N. Y. 626.

160 Sheldon v. Mirick, 144 N. Y. 498.

161 Kincaid v. Richardson, 25 Hun, 237.

162 Gray v. Seeber, 53 Hun, 611.

163 Matter of Kendrick, 107 N. Y. 104.

164 Code Civ. Proc. § 382, subd. 7.

165 L. 1894, c. 307, amending the Code provision, fixed the rule as to justice's judgments. Raphael v. Mencke, 28 App. Div. 91.

—— **Actions to redeem real property from a mortgage.** An action to redeem real property from a mortgage, with or without an account of rents and profits, may be maintained by the mortgagor, or those claiming under him, against the mortgagee in possession, or those claiming under him, unless he or they have continuously maintained an adverse possession of the mortgaged premises, for twenty years after the breach of a condition of the mortgage, or the non-fulfillment of a covenant therein contained.[166] This twenty year rule applies although the defendant by conveying the property to a bona fide purchaser has limited the plaintiff's relief to a money judgment.[167] But if the mortgagee has sold the property without authority, an action by the mortgagor for an accounting is not an action to redeem.[168] The wife of a mortgagor, whose inchoate right of dower was not cut off because she was not made a party to the foreclosure of the mortgage, claims through her husband, within this Code rule, so that her right to redeem is subject to the same rule as his right.[169]

Prior to the Code of Civil Procedure the period of limitation applicable to this class of actions, was ten years.[170]

—— **Actions on sealed instruments.** An action on a sealed instrument must be brought within twenty years.[171] But the sealed instrument must be the basis and the immediate foundation of the suit and not merely an ultimate source of the obligation that the plaintiff seeks to enforce.[172] Thus, an ac-

The marine court of New York city was a court of record within the twenty year rule. Camp v. Hallanan, 42 Hun, 628.

166 Code Civ. Proc. § 379; Shriver v. Schriver, 86 N. Y. 575; Finn v. Lally, 1 App. Div. 411; Wood v. Baker, 38 State Rep. 872.

167 Mooney v. Byrne, 163 N. Y. 86.

168 Mills v. Mills, 115 N. Y. 80.

169 Campbell v. Ellwanger, 81 Hun, 259, 62 State Rep. 754.

170 Miner v. Beekman, 50 N. Y. 337; Hubbell v. Sibley, 5 Lans. 51.

171 Code Civ. Proc. § 381.

172 19 Am. & Eng. Enc. Law, 274.

An action on a claim against a trust estate created in part for the purpose of paying debts, though arising out of a sealed instrument, where a demand had been made on the trustee for the amount and payment refused by him fifteen years before the action was brought, is not an action on a sealed instrument within the twenty years' lim

tion by a bondholder against a trustee in a railroad mortgage for issuing bonds to the mortgagor without receiving the proper requisition specifying the purpose for which they are to be used and seeing that the proper property which will furnish security has been acquired, is not an action on a sealed instrument since it rests upon the duty as trustee and not upon any covenant in the mortgage.[173] Whether the placing of a seal on an instrument, where not necessary, makes an action one on a sealed instrument, is questionable notwithstanding the court of appeals has held that an action on a co-partnership contract under seal, though a seal is not necessary, was an action on a sealed agreement within this rule.[174] As examples of actions held to be actions on sealed instruments within this rule may be mentioned actions on a sealed award,[175] on a partnership agreement under seal,[176] on a covenant by a grantee who has by his deed assumed payment of a mortgage,[177] on detached coupons of sealed negotiable bonds,[178] for rent based on a sealed lease,[179] for an accounting based on a sealed instrument,[180] and for interest on a specialty.[181] This rule also applies to proceedings against other property of a deceased mortgagor for a deficiency arising after foreclosure[182] and to the right of a creditor to pur-

itation. Hill v. McDonald, 58 Hun, 322, 34 State Rep. 814, 19 Civ. Proc. R. (Browne) 431.

173 Rhinelander v. Farmers' Loan & Trust Co., 172 N. Y. 519.

174 Dwinelle v. Edey, 102 N. Y. 423.

175 Smith v. Lockwood, 7 Wend. 241.

176 In Dwinelle v. Edey, 102 N. Y. 423, the court of appeals held that an action on a co-partnership agreement under seal, by which the expense should be borne by the parties in equal proportions, where the partnership had expired and the business had resulted in large losses paid by the plaintiff, and an accounting and payment of one-half of such sum was demanded, was an action founded on a sealed instrument.

177 New York Life Ins. Co. v. Aitkin, 125 N. Y. 660.

178 Kelly v. Forty-second St., M., & S. N. Ave. Ry. Co., 37 App. Div. 500; Bailey v. County of Buchanan, 115 N. Y. 301.

179 Long v. Stafford, 103 N. Y. 274.

180 Bommer v. American Spiral Spring Butt Hinge Mfg. Co., 44 Super. Ct. (12 J. & S.) 454; Miller v. Parkhurst, 9 State Rep. 759.

181 Mower v. Kip, 2 Edw. Ch. 165.

182 Hauselt v. Patterson, 124 N. Y. 349.

sue a legatee for the debt of his testator where the claim arises on a sealed instrument.[183]

On the other hand, the fact of an unsealed instrument being acknowledged as a sealed instrument does not change the statutory period of limitation of an action on the unsealed instrument from six to twenty years.[184] Nor does the fact of an unsealed note being recognized by an instrument under seal change the character of the note and give it the effect of a sealed instrument.[185] Where bonds are void the coupons thereon can not be regarded as sealed instruments[186] and an action on an administrator's bond to compel an accounting, though the bond is under seal, is not within this twenty year rule since the obligation to account exists independent of contract.[187] Likewise, an action for specific performance of a contract under seal is not an action on a sealed instrument[188] nor is an action to enforce payment of a legacy.[189] So an action upon the express or implied promise of a grantee, to pay a consideration for the transfer of property, is barred in six years, although the transfer was made by a sealed instrument, if the instrument contained no obligation to pay.[190] And if an action is solely for an accounting, the right to an accounting not being sued upon as upon an express covenant to make such accounting, the maintenance of the action depends upon the exercise of the discretion of a court on its equity side and is not necessarily an action upon a sealed instrument.[191]

§ 476. Ten years.

Under the statutes of New York, there is a fixed limitation for every cause of action, whether legal or equitable. If no special limitation is prescribed by statute or contract, the Code

183 Colgan v. Dunne, 50 Hun, 443, 21 State Rep. 315.
184 Crouse v. McKee, 14 State Rep. 158.
185 Crouse v. McKee, 14 State Rep. 158.
186 Smith v. Town of Greenwich, 80 Hun, 118, 61 State Rep. 786.
187 Matter of Nicholls, 23 Abb. N. C. 479.
188 Peters v. Delaplaine, 49 N. Y. 362.
189 Loder v. Hatfield, 71 N. Y. 92; Zweigle v. Hohman, 75 Hun, 377.
190 Coleman v. Second Ave. R. Co., 38 N. Y. 201.
191 Yetter v. Westfield, 19 Misc. 328.

expressly provides that the action must be brought within ten years after the cause of action accrues.[192] This ten years' statute of limitations applies principally to cases exclusively within equitable jurisdiction.[193] It is the outgrowth of the provision of the Revised Statutes which required bills "for relief" wherein equity had exclusive jurisdiction, to be brought within ten years.[194] The words "for relief" have been stricken out. This statute bar will be applied where the right sought to be enforced by the equitable remedy is not a mere incident of the right attainable at law but is distinct from, and independent thereof, and not within the cognizance of a court of law.[195] It will be applied where the legal remedy is imperfect[196] or where relief by action at law should result in multiplicity of suits,[197] or where legal and equitable causes of action are united, and the relief sought must necessarily be of an equitable character.[198] But when there is an adequate remedy at law, the election by plaintiff to ask equitable relief does not avoid the limitation which would have governed had he sought the legal redress,[199] since a party cannot take his right of action out of the operation of the statute of limitations by asking in his complaint for unnecessary equitable relief.[200]

As before stated, this ten year period of limitation of equitable actions is not, where a purely equitable remedy is invoked, equivalent to a legislative direction that no period short of that time shall be a bar to relief in any case, nor does it preclude the court from denying relief in accordance with equitable

192 Code Civ. Proc. § 388.

An action by the people of the state founded on the spoliation or misappropriation of public property is barred in ten years. Code Civ. Proc. § 1972.

193 Butler v. Johnson, 111 N. Y. 204; Matter of Neilley, 95 N. Y. 390; Thacher v. Hope Cemetery Ass'n, 46 Hun, 594, 12 State Rep. 857; Gallup v. Bernd, 132 N. Y. 370; Rundle v. Allison, 34 N. Y. 180.

194 2 Rev. St. 301, §§ 50, 52. See ante, § 476.

195 Hoyt v. Tuthill, 33 Hun, 196.

196 Rundle v. Allison, 34 N. Y. 180.

197 Hoyt v. Tuthill, 33 Hun, 196.

198 McTeague v. Coulter, 38 Super. Ct. (6 J. & S.) 208.

199 Butler v. Johnson, 111 N. Y. 204; Mills v. Mills, 115 N. Y. 80; Hann v. Culver, 73 Hun, 109.

200 Jex v. City of New York, 13 State Rep. 545, 28 Weekly Dig. 115.

principles for unreasonable delay, although the full period of ten years has not elapsed since the cause of action accrued.[201]

This ten year rule applies to actions for specific performance,[202] actions to recover damages in lieu of specific performance,[203] actions to reform a contract or other instrument in writing,[204] actions to establish an express trust,[205] actions to remove a cloud on title,[206] and to actions by creditors against corporate stockholders to reach equitable assets.[207] So the right of an heir of an equitable mortgagor to recover the money received by the mortgagee upon selling the land is barred in ten years.[208] Likewise, if a person in a fiduciary position, becomes a purchaser of property of his principal at a public sale, the cause of action against him is barred in ten years.[209]

On the other hand, an action to have a legacy declared a charge upon real estate, is barred by the six years' statute of limitations since the remedy in equity and at law is concurrent.[210] So an action to enforce payment of a legacy must be brought within six years[211] as must a claim against a decedent's

[201] Calhoun v. Millard, 121 N. Y. 69.

[202] Bruce v. Tilson, 25 N. Y. 194; McCotter v. Lawrence, 4 Hun, 107, 6 Thomp. & C. 392; Hann v. Culver, 73 Hun, 109.

[203] Cooley v. Lobdell, 153 N. Y. 596, 603.

[204] Oakes v. Howell, 27 How. Pr. 145; Exkorn v. Exkorn, 1 App. Div. 124, 72 State Rep. 222, 37 N. Y. Supp. 68.

But if plaintiff seeks to recover damages under the instrument as reformed, the six years rule will apply to such recovery. Welles v. Yates, 44 N. Y. 525.

[205] Higgins v. Higgins, 14 Abb. N. C. 13.

[206] Schoener v. Lissauer, 107 N. Y. 111.

[207] Christensen v. Eno, 21 Wkly. Dig. 202.

[208] Westfall v. Westfall, 16 Hun, 541.

[209] A cause of action against an attorney, who becomes a purchaser at a sale for his client, being for a constructive fraud, is barred by the ten years' limitation. Yeoman v. Townshend, 74 Hun, 625, 57 State Rep. 182, 26 N. Y. Supp. 606.

The ten years' statute of limitation applies to actions to set aside a purchase by an assignee for the benefit of creditors made in his individual interest. Smith v. Hamilton, 43 App. Div. 17.

[210] Zweigle v. Hohman, 75 Hun, 377, 58 State Rep. 660, which, in effect, overrules the holding in Scott v. Stebbins, 91 N. Y. 605, though no reference is made thereto.

[211] Loder v. Hatfield, 71 N. Y. 92; Matter of Hodgman, 31 State Rep. 479, 10 N. Y. Supp. 491.

estate which the creditor seeks to enforce against devisees[212] though it would seem that if no claim is made against the defendants personally and the only relief asked for is that property described in the complaint be sold and the debt of the plaintiff paid out of the proceeds, the suit is strictly an equitable suit wherein the ten year statute applies.[213]

The general rule is that an action for an accounting is barred in ten years.[214] This applies to a proceeding by an administrator to compel the representative of his deceased predecessor to account,[215] and to actions by a stockholder against directors for an accounting.[216] But if the right to an accounting is based on a sealed instrument, the action may be brought at any time within twenty years,[217] and furthermore if an adequate remedy exists on the law side of the court, the six and not the ten year rule will apply where the action is not based on a sealed instrument.[218]

In determining whether the six or ten year statute applies as dependent on whether the action is cognizable only in equity, it may be noticed that a cause of action at its inception cognizable only in a court of law may, by reason of subsequent events,

[212] Adams v. Fassett, 149 N. Y. 61; Burnham v. Burnham, 27 Misc. 106.

[213] Mortimer v. Chambers, 63 Hun, 335; Wood v. Wood, 26 Barb. 356.

[214] Rodman v. Devlin, 23 Hun, 590; Pierson v. Morgan, 20 Abb. N. C. 428; Merino v. Munoz, 5 App. Div. 71; Mooney v. Byrne, 1 App. Div. 316; Gray v. Green, 142 N. Y. 316.

The statute of limitations applicable to an action to adjust the affairs of a partnership is ten years, and not six, as there is no concurrent remedy at law. Still v. Holbrook, 23 Hun, 517.

A proceeding to compel an administrator to account is controlled by the ten-year statute of limitation applicable to suits in equity. Matter of Longbotham's Estate, 38 App. Div. 607, which overruled Matter of Taylor's Estate, 30 App. Div. 213 on the authority of Matter of Rogers' Estate, 153 N. Y. 316.

[215] Matter of Rogers' Estate, 153 N. Y. 316, 326; Matter of Post's Estate, 30 Misc. 551; Matter of Watson's Estate, 64 Hun, 369.

[216] Brinckerhoff v. Bostwick, 99 N. Y. 185.

[217] See ante, p. 470.

[218] Yetter v. Westfield, 19 Misc. 328, 78 State Rep. 268.

be cognizable only in a court of equity so that the ten year rule will apply.[219]

§ 477. Six years.

In a majority of cases the period of limitation is six years. The Code enumerates seven classes of actions which must be brought within six years which will now be considered.

——**Actions on simple contracts.** An action upon a contract obligation or liability, express or implied, must be brought in six years except an action on a judgment or sealed instrument.[220] It seems that the words "obligation or liability" were intended to enlarge the scope of the provision beyond what the word "contract" would give to it.[221] The language used is very broad and includes suits on quasi contracts, though equitable in their character as where an accounting is necessary.[222] It includes actions for money had and received[223] such as actions to recover taxes or assessments paid.[224] It also includes a vendor's action to foreclose an unsealed contract for sale of land.[225]

219 Thus, the right of a pledgor to redeem is a right enforceable only at law. But if, while the six year statute is running, the pledge is converted and passes to third persons and an accounting is necessary to determine the amount due on the pledge, the cause of action as well as the remedy became a subject of equitable cognizance and in that court only can the rights of the parties be determined. Treadwell v. Clark, 73 App. Div. 473.

220 Code Civ. Proc. § 382.

221 Matter of Nicholls, 23 Abb. N. C. 479.

222 Mills v. Mills, 115 N. Y. 80; Roberts v. Ely, 113 N. Y. 128.

223 Roberts v. Ely, 113 N. Y. 128; Pierson v. McCurdy, 100 N. Y. 608; Hopper v. Brown, 34 Misc. 661.

Where a person employs an attorney to collect money, and instructs him to remit the amount collected to a third person, and then makes an assignment for the benefit of creditors, the assignee's claim therefor against the third person is for money had and received and would be barred in six years. Isham v. Phelps, 54 N. Y. 673.

The statute of limitations applies to an action for money had and received, although the money was received under circumstances from which the law would imply a trust. Price v. Mulford, 107 N. Y. 303.

224 Diefenthaler v. City of New York, 111 N. Y. 331; Jex v. City of New York, 111 N. Y. 339; Trimmer v. City of Rochester, 30 State Rep. 703; Ackerson v. Board Sup'rs of Niagara County, 45 State Rep. 173.

An action by a town for misappropriation and diversion of taxes

—— **Actions to recover on statutory liability.** An action to recover upon a liability created by statute, except a penalty or forfeiture, must be brought in six years.[226] The phrase "liability created by statute," is intended to embrace liabilities arising out of and existing purely by virtue of some positive obligation imposed by statute. It does not embrace a liability which, though declared by statute and not enforceable in the absence of the statute, arises out of some voluntary act or agreement of the party.[227] Furthermore, the liability must be created by statute as distinguished from the constitution.[228] As an example of liability created by statute may be mentioned the liability of a devisee for the debts of his testator.[229]

—— **Actions for injuries to person or property.** An action to recover damages for an injury to property or a personal injury, except where a different period is expressly prescribed in the Code chapter on limitations, must be brought within six years.[230] But if defendant is an executor, administrator, receiver, or trustee of an insolvent debtor, an action to recover damages for taking, detaining, or injuring personal property, must be brought within three years.[231]

An "injury to property" is an actionable act whereby the

by the county must be brought within six years from the date of the misappropriation. Woods v. Board Sup'rs of Madison County, 136 N. Y. 403.

So an action by a supervisor of a town against the county to recover the amount of railroad taxes collected in that town and misappropriated by the county treasurer by paying the debts of the county under the direction of the board of supervisors instead of applying it in the purchase of town bonds issued in aid of the railroad, is in effect an action for money had and received, and is barred in six years after the misappropriation. Peirson v. Board Sup'rs of Wayne County, 155 N. Y. 105.

225 Plet v. Willson, 134 N. Y. 139.

226 Code Civ. Proc. § 382, subd. 2. See, also, post, pp. 479, 483.

227 19 Am. & Eng. Enc. Law, 281. See, also, Hauselt v. Patterson, 124 N. Y. 349; Clark v. Water Com'rs of Amsterdam, 148 N. Y. 1.

228 Clark v. Water Com'rs of Amsterdam, 148 N. Y. 1.

229 Adams v. Fassett, 149 N. Y. 61.

230 Code Civ. Proc. § 382.

231 Code Civ. Proc. § 383, subd. 4.

estate of another is lessened, other than a personal injury or the breach of a contract.[232]

A "personal injury" includes libel, slander, criminal conversation, seduction, and malicious prosecution; also an assault, battery, false imprisonment, or other actionable injury to the person either of the plaintiff, or of another.[233]

The phrase "except where a different period is expressly prescribed in this chapter" includes within its scope actions to recover damages for a personal injury resulting from "negligence" which must be brought in three years;[234] actions for libel, slander, assault, battery, seduction, criminal conversation, false imprisonment, malicious prosecution or malpractice which must be commenced in two years;[235] and other actions to be hereinafter enumerated.

—— **Actions to recover chattel.** An action to recover a chattel must be brought within six years.[236] But an action to recover a chattel, where defendant is an administrator, executor, receiver, or trustee of an insolvent debtor, must be brought within three years.[237]

—— **Actions based on fraud.** An action to procure a judgment, other than for a sum of money, on the ground of fraud, in a case which, on the thirty-first day of December, eighteen hundred and forty-six, was cognizable by the court of chancery, must be brought within six years.[238] This rule covers all cases

232 Code Civ. Proc. § 3343, subd. 10; Laufer v. Sayles, 5 App. Div. 582.

Where the purchasers of negotiable bonds with notice of, and therefore subject to, a lien, sell the same in hostility to the lien to bona fide purchasers, without notice thereof, who take the bonds freed from the lien, such destruction of the lien is an "injury to property." Hovey v. Elliot, 53 Super. Ct. (21 J. & S.) 331.

The six years statute of limitations applies to actions to recover damages arising from the unlawful detention of real property. Grout v. Cooper, 9 Hun, 326.

233 Code Civ. Proc. § 3343, subd. 9.

234 Code Civ. Proc. § 383, subd. 5. See post, pp. 481, 484.

235 Code Civ. Proc. § 384.

236 Code Civ. Proc. § 382, subd. 4.

237 Code Civ. Proc. § 383, subd. 4.

238 Code Civ. Proc. § 382, subd. 4.

An action to recover damages for false representations is not in-

formerly cognizable by the court of chancery whether its jurisdiction therein was exclusive or concurrent with that of courts of law, in which any remedy or relief is sought for, aside from, or in addition to a mere money judgment, and which a court of law could not give, although as part of the relief sought, a money judgment is also demanded.[239] It includes a judgment creditor's action to set aside a fraudulent conveyance.[240]

—— **Actions to establish will.** An action to establish a will must be brought in six years.[241]

—— **Actions on judgments or decrees of courts not of record.** An action upon a judgment or decree, rendered in a "court not of record," except where a transcript of a justice's judgment is filed with the county clerk, must be brought within six years.[242] An action to compel a set off of a judgment against another judgment is an action upon the judgment within the rule.[243] It has been held that this rule applies only to "actions" on the judgment and that hence it does not include supplementary proceedings.[244]

§ 478. Five years.

An action to annul a marriage on the ground that one of the parties was physically incapable of entering into the marriage state, must be commenced before five years have expired since the marriage.[245] Prior to 1895, the limitation was two years. Whether this provision absolutely prohibits a suit after five

cluded since an action to procure a judgment for a sum of money. Miller v. Wood, 116 N. Y. 351.

239 Bosley v. National Mach Co., 123 N. Y. 550; Carr v. Thompson, 87 N. Y. 160. Under the old Code, this rule applied only to cases "solely" cognizable in a court of chancery.

240 Weaver v. Haviland, 142 N. Y. 534.

241 Code Civ. Proc. § 382, subd. 6.

242 Code Civ. Proc. § 382, subd. 7.

243 Dieffenbach v. Roch, 112 N. Y. 621.

244 Green v. Hauser, 31 State Rep. 17, 18 Civ. Proc. R. (Browne) 354.

The court did not, however, consider section 414 of the Code which authorizes the word "action" to be construed as including a special proceeding.

245 Code Civ. Proc. § 1752.

years regardless of whether the defendant pleads the statute, is in doubt.[246]

An action for divorce on the ground of adultery must be commenced within five years after discovery by plaintiff of the offense charged.[247]

§ 479. Three years.

Five classes of actions are enumerated in the Code chapter on limitations wherein the period of limitation is three years. They will now be noticed.

—— **Actions against officers.** An action against a sheriff, coroner, constable, or other officer, for the non-payment of money collected upon an execution, must be brought within three years.[248] The same rule applies to an action against a constable, upon any other liability incurred by him, by doing an act in his official capacity, or by the omission of an official duty, except an escape.[249]

It is necessary to keep in mind, however, that an action against a "sheriff or coroner," on "any other" liability incurred by doing an act in "an official capacity" or by the omission of an official duty, must be brought in one year, as must actions against "any officer" for an escape of a person arrested or imprisoned by virtue of a civil mandate.[250] This provision as to sheriffs includes a deputy sheriff.[251] It will be noticed that this rule applies to escapes before, as well as after, the prisoner is actually committed to prison.[252] The term "upon

246 Kaiser v. Kaiser, 16 Hun, 603 held that the lapse of time must be pleaded, if the statute was sought to be relied on as a defense, but there is dicta to the contrary in Griffin v. Griffin, 23 How. Pr. 183. The holding in Kaiser v. Kaiser is criticised in 1 Rumsey's Pr. 97.

247 Code Civ. Proc. § 1758.

248 Code Civ. Proc. § 383, subd. 1; Frankel v. Elias, 60 How. Pr. 74; Bowne v. O'Brien, 5 Daly, 474.

This provision does not apply to the official bond of an overseer of the poor. Floyd v. Dutcher, 7 Misc. 629.

249 Code Civ. Proc. § 383, subd. 2.

250 Code Civ. Proc. § 385.

The provision respecting the time for commencing actions against sheriffs for official acts, applies to proceedings as for contempts to enforce civil remedies. Van Tassel v. Van Tassel, 31 Barb. 439.

251 Cumming v. Brown, 43 N. Y. 514.

252 Roe v. Beakes, 7 Wend. 459.

a liability incurred by him by doing an act in his official capacity" refers to a liability incurred by official malfeasance or misfeasance.[253] An early case holding that this rule did not apply to acts done by mere color of office[254] has been overruled in so far as the rule applies to acts done in good faith[255] and not tainted with fraud.[256] This one year rule applies to actions against a sheriff for seizure of property of a third person under an attachment[257] or a writ of execution.[258] It also applies to the failure of a sheriff to return an execution[259] and to the liability of a sheriff for the value of perishable property levied on by him under an attachment and sold on credit to a purchaser, who gave his note and a chattel mortgage, subsequent to which the property was destroyed by fire.[260]

—— **Actions for penalty or forfeiture.** An action upon a statute, for a penalty or forfeiture, where the action is given to the person aggrieved, or to that person and the people of the state, except where the statute imposing it prescribes a different limitation, must be brought within three years.[261] For instance, an action against a director of a corporation to recover a debt of the company by reason of the failure to file an annual report is for a penalty and depends wholly upon the

253 Hence an action against a sheriff to recover for feeding cattle, under an employment by the deputy who had the cattle in custody under a levy of execution, is not an action which must be brought within a year. Rice v. Penfield, 49 Hun, 368, 18 State Rep. 57, 15 Civ. Proc. R. (Browne) 268, 2 N. Y. Supp. 641.

254 Morris v. Van Voast, 19 Wend. 283.

255 Dennison v. Plumb, 18 Barb. 89.

256 The one year statute of limitations does not apply to an action by the supervisors of a county against the sheriff, to recover moneys paid, on fraudulent vouchers, for the board of fictitious prisoners in the county jail. Board Sup'rs of Kings County v. Walter, 4 Hun, 87, 6 Thomp. & C. 338.

257 Cumming v. Brown, 43 N. Y. 514; Snebly v. Conner, 7 Wkly. Dig. 93. The writ protects the sheriff though as to plaintiff he may have been a trespasser. Hill v. White, 46 App. Div. 360.

258 Dennison v. Plumb, 18 Barb. 89.

259 Peck v. Hurlburt, 46 Barb. 559.

260 Beyer v. Sigel, 75 App. Div. 83.

261 Code Civ. Proc. § 383, subd. 3.

statute so that it is barred in three years.[262] So an action to recover double the sum paid for lottery tickets, with double costs, is within the three years' limitations.[263]

Furthermore, an action against a director or stockholder of a moneyed corporation, or banking association, to recover a penalty or forfeiture imposed, or to enforce a liability created by the common law or by statute, must be brought within three years after the cause of action has accrued.[264]

It is necessary to clearly distinguish between the different provisions relating to actions for penalties or actions of like nature. First, the six year rule applies to actions to recover on a liability created by statute as distinguished from a penalty;[265] second, the three year rule applies to an action for a penalty where the action is given "to the person aggrieved or to that person and the people of the state"[266] and where the action is against "a director or stockholder of a moneyed corporation or banking association;"[267] third, the two year rule applies where the action is on a statute for a forfeiture or penalty to "the people of the state;"[268] fourth, the one year rule applies where the action is on a statute for a penalty given wholly or partly to any person who will prosecute for the same, but if not so brought it may be commenced within two years thereafter in behalf of the people of the state.[269]

[262] Chapman v. Lynch, 156 N. Y. 551; Merchants' Bank v. Bliss, 35 N. Y. 412; Nimmons v. Tappan, 32 Super. Ct. (2 Sweeny) 652.

But an action by stockholders against directors to recover for negligence which occasioned the loss of the value of the stock by reason of negligence and misconduct of the directors is not barred in three years but may be brought at any time within ten years. Hanna v. People's Nat. Bank of Salem, 35 Misc. 517.

[263] Grover v. Morris, 73 N. Y. 473.

[264] Code Civ. Proc. § 394; Beckham v. Hague, 38 Misc. 606.

The holding in Brinckerhoff v. Bostwick, 99 N. Y. 185 that the words "a liability created by law" had reference only to a liability created by statute, was obviated by L. 1897, c. 281, which amended the section so as to make it read "liability created by the common law or by statute."

[265] Code Civ. Proc. § 382, subd. 2.

[266] Code Civ. Proc. § 383, subd. 3.

[267] Code Civ. Proc. § 394.

[268] Code Civ. Proc. § 384, subd. 2.

[269] Code Civ. Proc. § 387.

—— **Actions against trustees.** An action against an executor, administrator, or receiver or against the trustee of an insolvent debtor, appointed, as prescribed by law, in a special proceeding instituted in a court or before a judge, brought to recover a chattel, or damages for taking, detaining or injuring personal property, by the defendant, or the person whom he represents, must be brought within three years.[270] This provision is not applicable to an action in equity to set aside judgments as fraudulent.[271]

—— **Personal injury actions.** An action to recover damages for a personal injury resulting from negligence, must be brought within three years.[272] There has been a considerable difference of opinion as to (1) what actions are for "personal" injuries and (2) what actions for personal injuries result from "negligence." As to the first proposition, it has been held that every case where the action is founded on the fact of an injury occasioned to a person by negligence, whether the person is that of the plaintiff or that of another individual for whose injury the plaintiff is entitled to bring the action, is founded on an injury to the person rather than an injury to property.[273] For example, an action to recover damages sustained by plaintiff in consequence of injuries inflicted upon his wife through defendant's negligence, though such damages arise from the loss of her services and the expenses incurred during her illness, is an action to recover damages for a personal injury and not for an injury to property.[274]

[270] Code Civ. Proc. § 383, subd. 4.

An action for damages for diverting the waters of a spring which had been accustomed to flow on plaintiff's premises, when brought against administrators, is not an action to recover a chattel or damages for taking, detaining or injuring personal property. Colrick v. Swinburne, 105 N. Y. 503.

[271] Varnum v. Hart, 47 Hun, 18, 14 State Rep. 140.

[272] Code Civ. Proc. § 383, subd. 5. Under the old Code the period of limitation was one year. Code Pro. § 94, subd. 2. Actions for malpractice are required to be brought in one year. L. 1900, c. 117, amending Code Civ. Proc. § 384. Formerly they were within this section. Burrell v. Preston, 54 Hun, 70

[273] Maxson v. Delaware, L. & W. R. Co., 112 N. Y. 559.

[274] Maxson v. Delaware, L. & W. R. Co., 112 N. Y. 559, which re-

As to the second proposition, a distinction is to be observed between an action for wrong and an action for negligence. For instance an action for personal injuries received from slipping on ice on a sidewalk, has been held based on negligence rather than on a nuisance.[275] So the liability of a carrier of passengers to a passenger injured in consequence of some defect in the vehicle is based solely upon negligence, irrespective of whether the action is in form ex contractu for a breach of the carrier's contract or ex delicto.[276] This three year rule covers cases of negligence irrespective of whether defendant was under a contract obligation to plaintiff.[277]

An exception to this rule is to be noted. Actions against cities and villages are governed by a special statute. An action for personal injury against a city of more than 50,000 inhabitants must be brought within one year[278] while similar actions against villages must be brought within two years.[279]

§ 480. Two years.

An action to recover damages for libel, slander, assault, battery,[280] seduction, criminal conversation, false imprisonment,[281] malicious prosecution, or malpractice,[282] must be brought within two years.[283]

versed lower court decision (48 Hun, 172) on this point and overruled Groth v. Washburn, 34 Hun, 509.

[275] Dickinson v. City of New York, 92 N. Y. 584.

On the other hand, an action based on the maintenance of a dangerous obstruction in a highway, has been held based on a nuisance rather than on negligence. Jorgensen v. Minister, etc., of Reformed Low Dutch Church, 7 Misc. 1, 57 State Rep. 842.

[276] Webber v. Herkimer & M. S. R. Co., 109 N. Y. 311.

[277] Burrell v. Preston, 54 Hun, 70, 26 State Rep. 489.

[278] L. 1886, c. 572, § 1.

[279] L. 1889, c. 440.

[280] Where a servant, in the course of his employment, commits an assault and battery, an action for damages therefor, though brought only against his employer, is an action for assault and battery, and therefore barred in two years. Priest v. Hudson River R. Co., 10 Abb. Pr., N. S., 60, 32 Super. Ct. (2 Sweeny) 595, 40 How. Pr. 456.

[281] Hurlehy v. Martine, 31 State Rep. 471, 10 N. Y. Supp. 92.

[282] This two year rule was extended to actions for malpractice by L. 1900, c. 117. It had formerly been held that the three year rule applied. Burrell v. Preston, 54 Hun, 70.

An action on a statute, for a forfeiture or penalty to the people of the state, must be brought within two years.[284] This applies to an action for penalties for nonpayment of the corporate franchise tax.[285]

An action for causing death by negligence must be brought within two years.[286]

Other actions which must be brought within two years are referred to below.[287]

§ 481. One year.

An action against a sheriff or coroner, upon a liability incurred by him, by doing an act in his official capacity, or by the omission of an official duty, except the non-payment of money collected upon an execution, must be brought within one year as must an action against any other officer, for the escape of a prisoner, arrested or imprisoned by virtue of a civil mandate.[288]

An action upon a statute for a penalty or forfeiture, given wholly or partly to any person who will prosecute for the same,

[283] Code Civ. Proc. § 384.

[284] Code Civ. Proc. § 384.

[285] People ex rel. N. Y. Loan & Imp. Co. v. Roberts, 157 N. Y. 70.

[286] Code Civ. Proc. § 1902.

[287] An action to recover damages from the erection in any city of an exterior wall partly on a strip of land not exceeding six inches and partly on an adjoining lot, where a building has been erected on the land of the plaintiff abutting on the exterior wall, must be brought within two years after the completion of the erection of such wall. Code Civ. Proc. § 1499; McDonald v. Bach, 29 Misc. 96.

An action to enforce personal liability of stockholders for debts of the corporation must be brought within two years. 2 Rev. St. (9th Ed.), 1026, § 55.

But this does not apply to stockholders of a full liability corporation organized under L. 1900, c. 567, § 6; Adams v. Slingerland, 39 Misc. 638.

An action by a stockholder or creditor of a corporation who has become such on the faith of a false certificate, report, or public notice, made or given by the officers or directors of such corporation, against the officers or directors signing the same, must be brought within two years from the time the certificate, report or public notice was made or given. 2 Rev. St. (9th Ed.), 1014, § 31.

[288] Code Civ. Proc. § 385. See ante, § 479.

must be commenced within one year after the commission of the offense; and if the action is not commenced within the year by a private person, it may be commenced within two years thereafter, in behalf of the people of the state, by the attorney-general, or the district-attorney of the county where the offense was committed.[289]

An action for personal injuries against a city having more than fifty thousand inhabitants, must be brought within a year.[290] This applies to an action for wrongfully causing death by negligence.[291] Other chapters of the Code provide for a one year limitation for particular actions.[292]

ART. III. WHEN STATUTE BEGINS TO RUN.

§ 482. Preliminary considerations.

The statutory period applicable to the cause of action having been settled, it is of importance in computing the time to determine when the cause accrued. The statute begins to run from the time the cause of action accrues, unless some statutory

[289] Code Civ. Proc. § 387.

This provision has been held to not apply to a qui tam action under the fourth section of the statute of frauds. Wilcox v. Fitch, 20 Johns. 472.

[290] L. 1886, c. 572, § 1.

But where the charter of a city provided for six months' notice of injury from a defect in a street, and the bringing of an action within one year after service of the notice, an action begun within that time, though more than a year after the injury, was not too late, notwithstanding the provision for bringing the action within one year after the injury, under the general statute, enacted after the charter, which, however, was in this respect re-enacted by L. 1888, c. 449. Lewis v. City of Syracuse, 13 App. Div. 587.

[291] Titman v. City of New York, 57 Hun, 469, 32 State Rep. 1016; judgment affirmed 125 N. Y. 729.

[292] An action to recover animals seized as strays on the highway or for damages for their seizure, must be brought within one year. Code Civ. Proc. § 3107.

An action to recover a penalty for charging an excessive fare on a railroad must be brought within a year. 2 Rev. St. (9th Ed.) 1274, § 37.

Actions against directors of membership corporations for a debt or liability of the corporation must be brought within one year after

exception postpones its operation. When a particular cause of action accrues is the important question the answer to which has been given to some extent by provisions of the Code. In general terms it may be stated that the cause of action accrues within the meaning of the statute only where the creditor has the right to demand present payment or has acquired the title on which the action is founded. The statute of limitations does not ordinarily run where there is no person who can sue; e. g. where a trusteeship is vacant.[293] Of course, if a right of action on a claim depends on a contingency or condition, the statute does not begin to run until the happening of such contingency or fulfillment of the condition.[294] For instance, a cause of action on an agreement to devise or bequeath does not accrue until death of the promisor[295] unless the agreement is repudiated in which case it accrues at the time of the repudiation.[296] Likewise, the cause of action on an agreement to indemnify does not accrue until the time of the damage.[297] And a cause of action in favor of a receiver of a national bank in another state against a stockholder in this state to recover an assessment on his stock levied by the comptroller of the cur-

the return unsatisfied of an execution against the corporation. 2 Rev. St. (9th Ed.) 1438, § 11.

An action to recover back usury paid, must be brought within a year. 2 Rev. St. (9th Ed.) 1855, § 3.

A proceeding to revoke the probate of a will must be brought within one year from the record of the decree admitting the will to probate. Code Civ. Proc. § 2648.

293 Dunning v. Ocean Nat. Bank, 61 N. Y. 497.

Where the first legal proprietor of a claim is a trustee having no interest, the cause of action may be regarded as vesting in the beneficiary, and if the latter is then under the disability of infancy, the statute does not begin to run until his majority. Bucklin v. Bucklin, 1 Abb. App. Dec. 242, 1 Keyes, 141.

294 Hope Mut. Ins. Co. v. Perkins, 2 Abb. App. Dec. 383, 38 N. Y. 404; Duer v. Twelfth St. Reformed Church, 31 State Rep. 975; Preston v. Fitch, 137 N. Y. 41, 50 State Rep. 72; Cooley v. Lobdell, 82 Hun, 98.

295 Taylor v. Welsh, 92 Hun, 272, 72 State Rep. 316; Eagan v. Kergill, 1 Dem. Surr. 464.

296 Bonesteel v. Van Etten, 20 Hun, 468.

297 Hale v. Andrus, 6 Cow. 225; Taylor v. Barnes, 69 N. Y. 430; Sibley v. Starkweather, 2 Silv. Sup. Ct. 472, 25 State Rep. 776.

rency, does not accrue until the assessment is levied.[298] A right of action on a contract to take effect on the happening of a certain event, does not accrue until the happening of such event.[299] Thus where liability is fixed by judgment or decree as on an executor's bond the statute commences to run from the date of the judgment or decree.[300]

The rules as to when a cause of action accrues will not be considered in this book in extenso except in so far as the accrual of the cause of action is affected by the statute or depends on particular facts.[301]

§ 483. Time of wrongful act or time when damages accrue.

It is the general rule that a cause of action accrues immediately on the happening of the wrongful act even though the actual damage resulting therefrom does not occur until sometime afterwards.[302] The test is whether the subsequent damages develop a new cause of action. If the original wrong contains within itself the complete cause of action and the resulting loss is merely an aggravation of damages, the statute commences to run at the time of the original wrong, rather than at the time of the resulting loss.[303] The cause of action for breach of contract begins to run from the time of the breach and not from the time when actual damage is sustained.

[298] Beckham v. Hague, 38 Misc. 606.

[299] Gilbert v. Taylor, 76 Hun, 92; Alden v. Barnard, 15 Misc. 512.

[300] Hood v. Hayward, 48 Hun, 330, 15 State Rep. 846.

[301] For an extended note on the time when a cause of action is deemed to have accrued, see 26 Abb. N. C. 3.

[302] Northrop v. Hill, 57 N. Y. 351; Pierson v. McCurdy, 100 N. Y. 608. The rule is otherwise where the cause of action is based on consequential as distinguished from direct damages and involves an act which might have proved harmless. 19 Am. & Eng. Enc. Law, 200. See, also, Ludlow v. Hudson River R. Co., 6 Lans. 128; Lefurgy v. New York & N. R. Co., 21 State Rep. 113, 3 N. Y. Supp. 302.

And the statute of limitations against an action for a penalty against a witness for signing a will without appending his address, begins to run from the death of the testator. Dodge v. Cornelius, 168 N. Y. 242. For a collection of cases based on the theory that the cause of action arises when damage first occurs, see 26 Abb. N. C. 3.

[303] Northrop v. Hill, 57 N. Y. 351. The court cited Argall v. Bryant, 3 Super. Ct. (1 Sandf.) 98, which was a case where there was neg-

§ 484. Continuing or recurring cause of action.

Where the cause of action is a continuing one, the time of accrual does not of necessity refer to its original inception but it is treated as though there were repeated causes of action and recovery may be had on those within the statutory limit. Familiar examples of continuing causes of action within the rule are nuisances,[304] injuries caused by faulty construction of dams,[305] injuries caused by diversion of water,[306] trespasses on real property by the erection of unlawful structures,[307] in-

ligence in publishing incorrectly in a newspaper the amount of capital contributed to a partnership by a special partner, where at the time of the erroneous publication only nominal damages were sustained, but after the firm had gone into business, plaintiff became liable as a general partner for its entire indebtedness. It was held that the statute of limitations began to run from the time that the error was committed and not from the time the damage occurred.

[304] Wright v. Syracuse, B. & N. Y. R. Co., 49 Hun, 445, 23 State Rep. 78, judgment affirmed 124 N. Y. 668; Board of Health of City of Yonkers v. Copcutt, 140 N. Y. 12.

[305] Reed v. State, 108 N. Y. 407.

[306] Where a diversion of water is a continuing injury and the wrong is not referable exclusively to the date when the original wrong was committed, the cause of action is barred only as to the damages accruing prior to the number of years fixed as a limitation of the action. Colrick v. Swinburne, 105 N. Y. 503; Silshy Mfg. Co. v. State, 104 N. Y. 562; Wright v. Syracuse, B. & N. Y. R. Co., 49 Hun, 445, 23 State Rep. 78, 3 N. Y. Supp. 480.

[307] Where there are separate and distinct trespasses giving rise to separate and distinct causes of action, exclusive actions may be commenced and maintained to recover damages sustained by such trespass, if brought within the statutory period of limitation from the time when the separate trespasses sued for occurred. Taylor v. Manhattan Ry. Co., 53 Hun, 309; Secor v. Sturgis, 16 N. Y. 548; Knox v. Metropolitan El. Ry. Co., 58 Hun, 517, 36 State Rep. 2.

An action by an abutter against a railroad company is not barred until the lapse of such time as would justify the presumption of a grant. Cheney v. Syracuse, O. & N. Y. R. Co., 8 App. Div. 620, 40 N. Y. Supp. 1103.

The right to bring an equitable action to restrain continuous trespasses upon real estate is not barred in ten years from the time of the original trespass but may be sustained if brought at any time so long as plaintiff has title to the property injured and a cause of action for such injuries is not barred at law. Galway v. Metropolitan El. Ry. Co., 128 N. Y. 132.

juries to highways by the erection of railroad crossings,[308] and the usurpation of corporate powers.[309] So a cause of action to remove a cloud upon title is continuous, so long as the occasion remains for the exercise of the power of a court of equity to remove the cloud on the title.[310]

—— **Actions for personal injuries.** The rule as to recurring causes of action does not apply to an action for personal injuries. Hence it does not apply to an action by a wife for enticement of her husband.[311] So a cause of action for absolute divorce will be barred at the expiration of five years from the time that plaintiff had knowledge of its existence, notwithstanding the offense was repeated and continued afterward.[312]

—— **Actions against corporate officers for failure to file report.** The right of action against officers of corporations for failure to file reports accrues at the time of the default and is not extended by subsequent omissions in this respect.[313]

§ 485. Actions against trustees.

As already stated, the statute does not run against an express trust until a breach or repudiation of the trust.[314] The statute of limitations never aids a person who is confessedly a

[308] Town of Windsor v. Delaware & Hudson Canal Co., 92 Hun, 127, 72 State Rep. 385, judgment affirmed 155 N. Y. 645.

[309] People ex rel. Barton v. Rensselaer Ins. Co., 38 Barb. 323.

[310] DeForest v. Walters, 153 N. Y. 229; Smith v. Reid, 134 N. Y. 568; Schoener v. Lissauer, 107 N. Y. 111.

An action by the taxpayers of a town for the cancellation of outstanding and invalid town bonds is in the nature of an action for the removal of a cloud upon the land within the town and for the enforcement of a continuing right, and is never barred by the statute of limitations. Strang v. Cook, 47 Hun, 46, 14 State Rep. 150.

As examples of what are not actions to remove clouds from title, see Purdy v. Collyer, 26 App. Div. 338; Town of Mt. Morris v. King, 8 App. Div. 495.

[311] Hogan v. Wolf, 32 State Rep. 550, 26 Abb. N. C. 1, 10 N. Y. Supp. 896.

[312] Valleau v. Valleau, 6 Paige, 207.

[313] Losee v. Bullard, 79 N. Y. 404; Cornell v. Roach, 9 Abb. N. C. 275; Knox v. Baldwin, 80 N. Y. 610; Trinity Church v. Vanderbilt, 15 Wkly. Dig. 499; Chapman v. Lynch, 156 N. Y. 551; Blake v. Clausen, 10 App. Div. 223.

[314] See ante, § 457.

trustee, except as it may serve to protect the trust fund from being depleted by a claim which is presumed to have been paid because no attempt has been made to enforce it for a prescribed number of years after it was due and payable. If the trust duties are continuing, the statute does not begin to run until after a repudiation of the trust obligation is openly made by the trustee and brought to the notice of the beneficiary.[315] A distinction must be drawn, however, with respect to the statute of limitations, between an actual, express, subsisting trust, and the case of an implied trust, of a trustee ex mal officio, or a constructive fraud. In the former the statute does not begin to run against the beneficiary or cestui que trust until the trustee has openly, to the knowledge of the beneficiary, renounced, repudiated or disclaimed the trust, while in the latter cases the statute begins to run from the time the wrong was committed, by one chargeable as trustee by implication. This distinction is recognized by the Code. Thus, by section 410 it is provided that where a right grows out of the receipt or detention of money or property by an agent, trustee, attorney or other person acting in a fiduciary capacity, the time must be computed from the time when the person having the right to make the demand has actual knowledge of the facts upon which that right depends.[316] The rule that the statute does not begin to run until the trust is repudiated, applies where the fund is in

[315] Matter of Post's Estate, 30 Misc. 551; Lammer v. Stoddard, 103 N. Y. 672; Zebley v. Farmers' Loan & Trust Co., 139 N. Y. 461; Govin v. De Miranda, 79 Hun, 329, 60 State Rep. 586; Gilmore v. Ham, 142 N. Y. 1; Merritt v. Merritt, 32 App. Div. 442.

[316] Yeoman v. Townshend, 74 Hun, 625; Talmage v. Russell, 74 App. Div. 7; Strough v. Board Sup'rs of Jefferson County, 50 Hun, 54, 23 State Rep. 940; Mills v. Mills, 115 N. Y. 80; Pease v. Gillette, 10 Misc. 467; Sheldon v. Sheldon, 133 N. Y. 1.

An action against the receiver of a dissolved corporation to establish the plaintiff's claim upon promissory notes made and indorsed by the corporation, where such action was not barred at the time of the appointment of a receiver, is not within the six years' statute of limitation, as the receiver in such case stands as a trustee, and cannot set up the statute of limitations so long as the trust is open and continuing against a claim not barred at the time of his appointment. Ludington v. Thompson, 153 N. Y. 499.

the hands of any person having knowledge of the trust.[317] That a trustee mingled the trust funds with his own in making a purchase of real estate, does not show a repudiation of the trust[318] though there is a repudiation where the trustee purchases the trust property on foreclosure[319] or asserts an individual right thereto.[320]

§ 486. Demand.

The question whether a demand is necessary in order to authorize the commencement of a suit, i. e., whether a demand is a condition precedent, is considered in another chapter.[321] It is only necessary in this connection to consider the Code rule that where a demand is necessary, the statute begins to run when the right to make the demand is complete.[322] In other words, a party cannot ordinarily prevent the running of a statute by neglecting to make a demand[323] except where a cause of action arises by virtue of a statute which requires a demand as an essential part of the action.[324] For instance, a promissory note payable on demand is barred in six years from its date[325] whether or not the note bears interest.[326] But where

317 Barnes v. Courtright, 37 Misc. 60.

318 Hutton v. Smith, 74 App. Div. 284.

319 Hubbell v. Medbury, 53 N. Y. 98.

320 Mabie v. Bailey, 95 N. Y. 206.

321 See ante, §§ 61-72.

322 Code Civ. Proc. § 410.

This rule has been held to apply to actions against the city of New York notwithstanding Id. § 3341 declaring that any special provision of the statutes remaining unrepealed which is applicable exclusively to an action against said city shall not be affected by the Code. Dickinson v. City of New York, 92 N. Y. 584; Meehan v. City of New York, 16 Wkly. Dig. 346.

323 Chapman v. Lynch, 156 N. Y. 551.

324 Dickinson v. City of New York, 92 N. Y. 584.

325 Mills v. Davis, 113 N. Y. 243; Shutts v. Fingar, 100 N. Y. 539; DeLavallette v. Wendt, 75 N. Y. 579; Smith v. Ijams, 70 Hun, 155.

A promissory note payable "on demand after three months' notice," where demand was not made until over eleven years after the note was delivered, is barred by limitations. Knapp v. Greene, 79 Hun, 264, 60 State Rep. 559, 29 N. Y. Supp. 350.

Where the drawer of a check has no funds at the time in the bank

a balance in installments is due on stock in a corporation when called for by the board of trustees for the purpose of business, the right to sue for such installments does not ordinarily accrue until a call is made by the board of trustees;[327] so capital stock notes of a mutual fire insurance company, though payable on demand, do not become due until after an assessment, demand and notice, which are requisite before the statute begins to run against the liability of the makers upon them.[328]

——**Exceptions as to claims against person acting in a fiduciary capacity.** The Code makes two exceptions to this rule just stated. The first exception applies to claims against a person acting in a fiduciary capacity in which case the statute does not begin to run until the person having the right to make the demand has actual knowledge of the facts on which that right depends. This exception applies, in the words of the Code, "where the right grows out of the receipt or detention of money or property, by an agent, trustee, attorney, or other person acting in a fiduciary capacity."[329] The statute is merely a codification of the law as it existed at the time of its adoption.[330] The reason for the rule may be illustrated by an early case which held that a client was barred of his claim against an attorney in six years from the time of the attorney's collection of money for his client, though the client was ignorant of the collection.[331] The injustice of such a rule is unquestionable. It should be noticed, however, that the money must have been

to meet it, the check is due immediately, without presentment and demand, and the statute therefore runs from its date. Brush v. Barrett, 82 N. Y. 400.

[328] Cornell v. Moulton, 3 Denio, 12; Bartholomew v. Seaman, 25 Hun, 619; McMullen v. Rafferty, 89 N. Y. 456.

[327] Williams v. Taylor, 120 N. Y. 244, which reviews and distinguishes the earlier cases.

[328] Raegener v. Medicus, 67 App. Div. 127.

[329] Code Civ. Proc. § 410, subd. 1.

See Cornwell v. Clement, 10 App. Div. 446, 76 State Rep. 295; Merino v. Munoz, 5 App. Div. 71.

[330] King v. MacKellar, 109 N. Y. 215.

[331] Stafford v. Richardson, 15 Wend. 302.

For application of statutory rule, see Wood v. Young, 141 N. Y. 211; Bronson v. Munson, 29 Hun, 54.

received by a trustee or other person "acting in a fiduciary capacity."[332]

The statute does not commence to run against the right of a ward to compel her guardian to account, until the ward reaches her majority and ascertains the fact that the guardian has moneys which he has failed to account for, where there has been no act of the guardian known to the ward in repudiation of the guardianship.[333] So if an executor uniformly concedes that he holds an estate in trust and makes payments from time to time to the residuary legatee, the statute does not run against the right to require him to account therefor.[334]

—— **Exceptions as to deposits and deliveries of personal property.** The second exception applies to a deposit of money to be repaid on a special demand and not at a fixed time, or a delivery of personal property not to be returned specifically or in kind at a fixed time or upon a fixed contingency, in which case the time runs only from actual demand.[335] It will be noticed that this exception applies only where there is an "agreement or undertaking" as to a re-payment of moneys deposited on a special demand or a return of property delivered.[336] The rule is not, it seems, confined to deposits in banks but extends to similar transactions between private individuals. The deposit must, however, be for an indeterminate, as distinguished from a determinate, period.[337] Hence, money deposited by a contractor as security for the performance of his contract, to be returned on complete performance duly certified, is not money "deposited to be repaid only on special de-

332 Clowes v. City of New York, 47 Hun, 539, 15 State Rep. 176.

333 In re Camp, 126 N. Y. 377, followed by Matter of Sack, 70 App. Div. 401. But in Matter of Lewis, 36 Misc. 741, the ten-year statute was held a bar to the right to compel the executor of a deceased guardian to render an account where the ward made no claim during the eight years after she reached her majority and while the guardian was alive nor made any claim until thirteen years after the death of the guardian.

334 Matter of Irvin's Estate, 68 App. Div. 158.

335 Code Civ. Proc. § 410, subd. 2.

336 Adams v. Olin, 140 N. Y. 150.

337 Gregory v. Fichtner, 38 State Rep. 192.

mand."[338] Moneys deposited in a bank to be drawn against by check[339] and deposits represented by certificates of deposit,[340] are "deposits" not to be repaid at a fixed time. A certificate of deposit has sometimes been confounded with a promissory note.[341] Furthermore, a deposit is to be distinguished from a loan.[342] For instance, a payment by a wife of her money to her husband telling him to take care of it, he saying that he would use it for his land, is not a deposit.[343]

[338] Corkings v. State, 99 N. Y. 491.

[339] Bank of British North America v. Merchants' Nat. Bank, 91 N. Y. 106. Where money is deposited to be invested and accounted for on plaintiff's request, the statute does not begin to run until demand is made. Sheldon v. Sheldon, 33 State Rep. 754.

[340] Howell v. Adams, 68 N. Y. 314.

[341] An instrument in writing headed "Certificate of Deposit," but stating that a person named "has deposited in this bank two hundred dollars, payable to the order of himself, 3 mos. after date, in current funds on return of this certificate properly indorsed, and shall receive interest at the rate of seven per cent. per annum if left —— months from date," and signed by one as "cashier," is not a certificate of deposit, but a promissory note, against which the statute of limitations ran from the time it was due, and upon which a demand was not necessary to set the statute running. Baker v. Leland, 9 App. Div. 365, 75 State Rep. 812, 41 N. Y. Supp. 399.

An instrument given by a firm of brokers, who also received deposits on demand, in this form: "Due A., trustee, $4,000, returnable on demand. It is understood that this sum is specially deposited with us and is distinct from the other transactions with said A.," is a certificate of deposit, and the statute does not run against the holder's claim until demand made. Smiley v. Fry, 100 N. Y. 262.

[342] This question is discussed at length in Payne v. Gardiner, 29 N. Y. 146 which held that where money is delivered to defendant and credited to plaintiff on defendant's books, and a written receipt is given stating that the money is to plaintiff's credit on the firm books at six per cent. interest, the transaction is a deposit. See, also, Boughton v. Flint, 74 N. Y. 476; Sheldon v. Sheldon, 33 State Rep. 754; Dorman v. Gannon, 4 App. Div. 458; Chapman v. Comstock, 58 Hun, 325, 34 State Rep. 517.

Where a husband received money, the proceeds of the sale of his wife's separate property, in her presence and for her use, but no agreement as to his withholding the money for safekeeping or otherwise was shown, the transaction was considered a loan. Matter of Cole's Estate, 34 Hun, 320.

[343] Matter of Steward, 90 Hun, 94, 69 State Rep. 766.

If there is a delivery of personal property, then it is necessary that the property is not to be returned "at a fixed time or on a fixed contingency." Property deposited for safe-keeping[344] or property delivered and held under a conditional sale is, within this rule, not to be returned "at a fixed time or on a fixed contingency."[345]

§ 487. Ignorance or concealment of facts.

Ignorance of the facts does not ordinarily prevent the operation of the statute of limitations[346] except in cases of fraud,[347] claims against a person acting in a fiduciary capacity,[348] and actions for the reformation of a written instrument.[349] For instance, in the case of a simple conversion without right on which an action would lie without demand, the fact that the cause of action remained undiscovered does not prevent the statute of limitations from running meanwhile.[350] Furthermore, a fraudulent concealment by defendant of a cause of action does not ordinarily prevent the operation of the statute.[351]

[344] Ganley v. Troy City Nat. Bank, 98 N. Y. 487.

[345] Fry v. Clow, 50 Hun, 574.

Where a debt is payable on demand and no time for redemption is fixed as to property pledged as collateral, the statute does not run against the right to foreclose a lien on the property pledged, until a demand is made. Bowman v. Hoffman, 47 State Rep. 487. The case of Roberts v. Sykes, 30 Barb. 173, must be considered as overruled.

[346] Leonard v. Pitney, 5 Wend. 30; Van Tassel v. Van Tassel, 31 Barb. 439; Oakes v. Howell, 27 How. Pr. 145; Mason v. Henry, 152 N. Y. 529.

[347] See post, p. 495; Exkorn v. Exkorn, 1 App. Div. 124, 72 State Rep. 222.

[348] Code Civ. Proc. § 410, subd. 1. See ante, p. 491.

[349] Syms v. City of New York, 50 Super. Ct. (18 J. & S.) 289; Perrior v. Peck, 39 App. Div. 390; De Forest v. Walters, 153 N. Y. 229, in which it was held that where plaintiff's action of ejectment furnishes the occasion for the interpretation of the defendant's claim of equitable relief, the statute of limitations does not begin to run against defendant until he is charged with knowledge of an assertion of some adverse claim in favor of the plaintiff.

[350] Burt v. Myers, 37 Hun, 277.

[351] Allen v. Mille, 17 Wend. 202; Leonard v. Pitney, 5 Wend. 30; Humbert v. Trinity Church, 24 Wend. 587.

—— **Actions based on fraud.** A cause of action based on fraud, "where a money judgment is not sought," does not accrue until the discovery by plaintiff, or the person under whom he claims, of the facts constituting the fraud.[352] As before stated,[353] the rule covers all cases of fraud formerly cognizable by the court of chancery, whether its jurisdiction therein was exclusive or concurrent with that of courts of law in which any remedy or relief is sought for, aside from or in addition to a mere money judgment, and which a court of law could not give, although as part of the relief sought a money judgment is also demanded.[354] The discovery must be of the facts constituting the fraud itself and not those constituting evidence thereof.[355] It seems, however, that where the circumstances are such as to suggest to a person of ordinary intelligence the probability that he has been defrauded, a duty of inquiry arises, and if he omits that inquiry when it would have developed the truth, and shuts his eyes to the facts which call for investigation, knowledge of the fraud will be imputed to him. He will be held, for the purpose of the statute of limi-

352 Code Civ. Proc. § 382, subd. 5.

A cause of action to set aside a fraudulent assessment is not deemed to have accrued until the discovery of the fraud. Selpho v. City of Brooklyn, 9 State Rep. 700.

Where the property of a debtor sold upon execution against him is bought in by a third person for the debtor's benefit and to defraud his creditors, but upon the individual credit of the purchaser and in reliance upon and after reimbursement by the debtor, the statute does not begin to run against the creditors defrauded until discovery of the fraud. Decker v. Decker, 108 N. Y. 128.

The statute does not begin to run against an action to set aside a transfer of property belonging to plaintiff on the ground of fraud until the discovery of fraud by the plaintiff, and in such action, a recovery may be had for sums collected by defendant from the property transferred, although more than six years elapsed between such collection and the commencement of the action. White v. Price, 39 Hun, 394, judgment affirmed 108 N. Y. 661.

353 See ante, § 476.

354 Bosley v. National Mach. Co., 123 N. Y. 550.

The provision does not apply to an action to recover money damages. Miller v. Wood, 116 N. Y. 351; East River Sav. Inst. v. Barrett, 23 Misc. 423.

355 Stevens v. Reed, 60 N. Y. Supp. 726.

tations, to have actually known what he might have known and ought to have known.[356] Knowledge of the facts is sufficient to start the statute running notwithstanding a low grade of intelligence in the injured party.[357] It should also be noticed that the action must be based on fraud as distinguished from mistake.[358] The date of the discovery of the fraud does not, however, set the statute running as against a cause of action to set aside a fraudulent conveyance which does not accrue until the recovery of judgment and return of execution thereon unsatisfied.[359]

§ 488. Actions on mutual accounts.

In an action to recover a balance due on a mutual, open, and current account, where there have been reciprocal demands between the parties, the cause of action is deemed to have accrued from the time of the last item, proved in the account on either side.[360]

It is to be observed that the account must be a (1) mutual, (2) open, and (3) current one, and (4) there must have been reciprocal demands between the parties.

Accounts are mutual where each party makes charges against the other. There must be items on both sides, debit and credit.

[356] Higgins v. Crouse, 147 N. Y. 411.

[357] The question whether a discovery of the fraud has taken place does not depend upon the mental condition of the party injured, where he has legal capacity to act and to contract, nor upon his freedom from undue influence or ability to resist it. If he has ascertained the facts which constitute the fraud, and so has discovered its existence, the statute begins to run irrespective of the degree of intelligence possessed by the injured party, and whether he has enough courage and independence to resist a hostile influence and assert his rights. Piper v. Hoard, 107 N. Y. 67.

[358] Exkorn v. Exkorn, 1 App. Div. 124; Oakes v. Howell, 27 How. Pr. 145, 151.

[359] Weaver v. Haviland, 142 N. Y. 534.

[360] Code Civ. Proc. § 386.

This statutory provision is based on the statute of James I.

For a history of the various statutes on this point, see the leading case of Green v. Disbrow, 79 N. Y. 1.

Charges on one side and receipts on the other are not enough.[361] For an example of a mutual account may be mentioned an action to recover a balance due upon a store account, where defendant had delivered to plaintiff small quantities of butter and eggs at different times to be credited upon the account.[362] Mere cross demands are not included.[363] And an account upon which but three items of credit appear in five years is not a mutual, open and running account.[364]

An account is "open" until a balance is stated.[365] Therefore

[361] Green v. Disbrow, 79 N. Y. 1, 9; Edmondstone v. Thomson, 15 Wend. 554; Fennell v. Black, 24 Misc. 728.

Thus where defendant bought and sold stock in his own name, but for the common benefit of himself and plaintiff, who advanced money therefor, and defendant held stock so bought for several years, this was not a case of mutual dealings. Atwater v. Fowler, 1 Edw. Ch. 417.

Mere payments on one side, and demands on the other, do not constitute a mutual account. Peck v. New York & Liverpool U. S. Mail Steamship Co., 18 Super. Ct. (5 Bosw.) 226.

Necessity that account be mutual, see, also, Hallock v. Losee, 3 Super. Ct. (1 Sandf.) 220; Palmer v. City of New York, 4 Super Ct. (2 Sandf.) 318; Murray v. Coster, 20 Johns. 576; Kimball v. Brown, 7 Wend. 322.

[362] Green v. Disbrow, 79 N. Y. 1.

[363] Perrine v. Hotchkiss, 2 Thomp. & C. 370.

[364] Matter of Gladke, 45 App. Div. 625, 60 N. Y. Supp. 869.

For further examples of what does not constitute a mutual, open and current account, see MacDonald v. Jaffa, 53 App. Div. 484; Huebner v. Roosevelt, 6 Daly, 337; Gilbert v. Comstock, 13 Wkly. Dig. 166; Burdick v. Hicks, 29 App. Div. 205.

A current account kept by a husband of his transactions with his wife's money showing what amounts went to her credit and what payments were made therefrom, does not constitute a mutual account showing reciprocal demands. Adams v. Olin, 140 N. Y. 150.

Rent, and a claim by the tenant against the landlord for moneys loaned, do not constitute running or mutual accounts. Bodell v. Gibson, 23 Hun, 40.

Cash received to be applied on general account extinguishes pro tanto the indebtedness, and if paid in advance, applies to extinguish the next indebtedness, but does not form part of a mutual, open, and current account so as to enable the exception in the statute of limitations to apply. Raux v. Brand, 90 N. Y. 309.

[365] Hence, promissory notes, bonds, etc., being not only evidence of a balance liquidated and adjusted, but express obligations to pay

accounts stated are not included.[366] Where there has been a settlement of the accounts and a balance found due the statute runs from the time of the adjustment.[367] An assignment of the balance to a third person will close the mutual account between the parties and a subsequent reassignment will not revive the obligations.[368]

The words "reciprocal demands" mean no more than "mutual accounts."[369] While defendant must have an account against plaintiff which he can interpose as a set-off to the extent thereof, it is not necessary that each party shall have an independent cause of action against the other.[370]

This rule refers to accounts and dealings originally between the parties. Hence, where a mutual, open and current account exists between two parties, and one purchases from a third person an open account against the other, without notice to the latter, or any recognition of its validity by him, it does not become a part of the mutual account between them.[371] Furthermore, an obligation, even if entered in an account, does not constitute a part of it where an action may be brought on it as a separate obligation.[372]

§ 489. Actions on sealed instrument for breach of covenant of seizin or against incumbrances.

Where an action is brought for breach of a covenant of seizin, or against incumbrances, the cause of action in so far

specific sums, cannot constitute an open account. Perrine v. Hotchkiss, 2 Thomp. & C. 370.

366 Ramchander v. Hammond, 2 Johns. 200.

367 Agan v. File, 66 State Rep. 418, 32 N. Y. Supp. 1066.

Payment of an ascertained balance of an account in settlement of dealings between the parties does not constitute an item of account from which the statute of limitations begins to run. Compton v. Bowns, 5 Misc. 213, 54 State Rep. 795, 23 Civ. Proc. R. (Browne) 225.

368 Hall v. Stone, 60 Hun, 309, 38 State Rep. 229.

369 Green v. Disbrow, 79 N. Y. 1.

370 Green v. Disbrow, 79 N. Y. 1.

371 Green v. Ames, 14 N. Y. (4 Kern.) 225.

372 Perrine v. Hotchkiss, 2 Thomp. & C. 370.

Where three of the items were for chattels borrowed and not returned, it was doubted if they formed any part of a current account within the statute. Swift v. Swift, 5 App. Div. 587.

as the statute requires actions on sealed instruments to be brought within twenty years, is deemed to have accrued upon an eviction and not before.[373]

§ 490. Actions to establish will.

A cause of action to establish a will, where the will has been lost, concealed, or destroyed, is not deemed to have accrued, until the discovery by the plaintiff, or the person under whom he claims, of the facts upon which its validity depends.[374]

§ 491. Actions by devisees or legatees against executors or administrators.

A cause of action in favor of a person entitled to a legacy or distributive share, against the executor or administrator who refuses to pay the same, does not accrue until the executor's or administrator's account is judicially settled.[375]

§ 492. Actions on judgments.

A cause of action on a judgment or decree rendered in a court not of record, except where a transcript of a justice's judgment is filed with the county clerk, accrues when final judgment is rendered.[376]

§ 493. Actions for conversion.

In trover, when the inquiry is at what time the statute begins to run, reference is had to the time of the conversion, and never to the time of a demand and refusal, unless such refusal is of itself a conversion, or the demand and refusal is the only evidence. In the latter case the time thereof is the criterion,

[373] Code Civ. Proc. § 381; Converse v. Miner, 21 Hun, 367; Finton v. Egelston, 61 Hun, 246, 40 State Rep. 936.

[374] Code Civ. Proc. § 382, subd. 6.

[375] Code Civ. Proc. § 1819; Congregational Unitarian Soc. v. Hale, 29 App. Div. 396; In re Lynch's Estate, 24 Wkly. Dig. 543; Matter of Hodgman, 31 State Rep. 479; Matter of May, 31 State Rep. 50.

[376] Code Civ. Proc. § 382, subd. 7.

simply because there is no other means of ascertaining when a conversion did take place.[377]

§ 494. Action for money had and received.

When money is received by one to and for the use of another, under such circumstances that it is his duty at once to pay it over, the statute of limitations begins to run from the day of the receipt of the money.[378] So the action to recover taxes paid on an illegal assessment arises at the time of payment[379] and this though the assessment has never been set aside.[380]

§ 495. Action by principal for misconduct of agent.

Where an injury results from the act or omission of a deputy or agent, the time, within which an action to recover damages by reason thereof, must be commenced by the principal, against the deputy or agent, must be computed from the time when a judgment against the principal, for the act or omission, is first recovered by the aggrieved person; and a subsequent reversal or setting aside of the judgment does not extend the time.[381]

§ 496. Actions for services.

Actions for services to be paid for at stated intervals accrue at such times and not at the completion of the service. The difficulty in such cases arises where the contract is one of gen-

[377] Kelsey v. Griswold, 6 Barb. 436; Read v. Markle, 3 Johns. 523; Roberts v. Berdell, 52 N. Y. 644.

[378] Mills v. Mills, 115 N. Y. 80; Teall v. City of Syracuse, 120 N. Y. 184. The two years' statute of limitations commences to run, as against the right to recover twice the amount of usurious interest paid to a national bank at the date of each cash payment of an excessive discount. Smith v. First Nat. Bank of Cuba, 70 App. Div. 376.

[379] Trimmer v. City of Rochester, 134 N. Y. 76; Parsons v. City of Rochester, 43 Hun, 258, 5 State Rep. 467, 26 Wkly. Dig. 90.

See, also, Reid v. Board Sup'rs of Albany County, 128 N. Y. 364.

[380] Brundage v. Village of Portchester, 31 Hun, 129.

[381] Code Civ. Proc. § 407.

This rule changes the law laid down in the early case of Bank of Utica v. Childs, 6 Cow. 238, where a bank sued its notary for failure to give notice to prior indorsers of a note held by the bank for collection.

eral hiring without an express agreement as to the time of payment. In such cases where the employment has continued for a long period and there are no mutual accounts there may be a recovery only for services within the statutory period unless there has been a revivor by promise or payment within that time.[382] Where the services have covered a series of years the hiring will be regarded as from year to year[383] unless there are circumstances tending to show a hiring for other periods.[384] But where not only the services sued for are continuous over a series of years, but the contract of employment is single and entire, the statute will not commence to run until after the completion of the service.[385]

§ 497. Cause of action accruing between the death of a testator or intestate, and the grant of letters.

For the purpose of computing the time, within which an action must be commenced in a court of the state, by an executor or administrator, to recover personal property, taken after the death of a testator or intestate, and before the issuing of letters testamentary or letters of administration; or to recover damages for taking, detaining, or injuring personal property within the same period; the letters are deemed to have been issued within six years after the death of the testator or intestate.[386] Prior to the enactment of this Code provision, the

[382] Matter of Gardner, 103 N. Y. 533; Matter of Meehan, 29 Misc. 167.

[383] Davis v. Gorton, 16 N. Y. 255; Nicholl v. Larkin, 2 Redf. Surr. 236; Matter of Stewart's Estates, 21 Misc. 412.

[384] Where an attendant of the marine court was paid his monthly salary by the city comptroller, at each payment claiming that his salary was larger, and claiming the larger amount, his cause of action accrued against the city at the time of such payments. Mason v. City of New York, 28 Hun, 115.

Where plaintiff in an action for salary testified that he was to be paid $100 per month, and had applied monthly for payment on defendant's regular pay days, it was presumed that his employment was by the month, and that the statute barred the amount claimed for such of the months as were more than six years before the commencement of the action. Mahony v. Clark, 1 App. Div. 196, 72 State Rep. 618.

[385] Dailey v. Devlin, 21 App. Div. 62.

[386] Code Civ. Proc. § 392.

See post, § 503, as to extension of time where any of next of kin, legatees or creditors are under disability.

cases held that an action could not be maintained until there was a person capable of suing and hence that in such a case as the present the statute would not commence to run until the issuance of letters testamentary or letters of administration.[387] This statute refers to actions to recover tangible personal property taken after the death of a testator or intestate, and not to actions by personal representatives for an accounting by surviving partners, who are not trustees for the representatives of a deceased partner.[388]

ART. IV. POSTPONEMENT AND SUSPENSION OF STATUTE.

§ 498. General rules.

A party who seeks to avoid the statute of limitations, notwithstanding the lapse of the prescribed period, must bring himself expressly within some of the exceptions specified in the Code as no exception to the statute can be claimed, unless it is expressly mentioned therein.[389] In general, where the statute once begins to run it continues to run, notwithstanding any subsequent disability.[390] The transfer of ownership of a cause of action does not arrest the running of the statute after it has once commenced,[391] nor does a subsequent demand have that effect by creating a new cause of action or otherwise.[392]

§ 499. Stay of action by injunction, order, or statutory prohibition.

Where the commencement of an action has been stayed by

387 Bucklin v. Ford, 5 Barb. 393; Sanford v. Sanford, 62 N. Y. 554.

388 Cohen v. Hymes, 64 Hun, 54, 45 State Rep. 821.

389 Bucklin v. Ford, 5 Barb. 393; Fowler v. Wood, 78 Hun, 304, 60 State Rep. 176; Best v. Davis Sewing Mach. Co., 65 Hun, 72.

390 Jackson v. Johnson, 5 Cow. 74; Jackson v. Wheat, 18 Johns. 40. Where the statute has begun to run before the descent of the property to an infant heir, the disability of infancy does not interrupt the operation of the statute. Greagan v. Buchanan, 15 Misc. 580, 72 State Rep. 115, 37 N. Y. Supp. 83.

391 Bucklin v. Bucklin, 1 Abb. App. Dec. 242, 251.

392 Bruce v. Tilson, 25 N. Y. 194.

injunction,[393] or other order of a court or judge,[394] or by statutory prohibition,[395] the time of the continuance of the stay is not a part of the time limited for the commencement of the action.[396] This Code rule has been held to not apply to limitations contained in a contract[397] but recent decisions in effect hold the contrary.[398] It is not sufficient, to bring a case within this exception, that proceedings taken were more potent than an injunction or other order of court, to stay plaintiff's action, since, as before stated, no exception can be claimed unless it is expressly mentioned in the statute.[399]

[393] Fincke v. Funke, 25 Hun, 616; Sands v. Campbell, 31 N. Y. 345; McQueen v. Babcock, 3 Abb. App. Dec. 129, 3 Keyes, 428.

It is immaterial whether the injunction was served if it was issued and brought to plaintiff's notice. Berrien v. Wright, 26 Barb. 208.

But the operation of the statute of limitations against an action for conversion brought by a bailee of property will not be suspended by the existence of an injunction order issued at the instance of a third person restricting the plaintiff from disposing of or in any manner interfering with the property in question, as such injunction would not prevent an action for the preservation or protection of the possession of the property. Van Wagonen v. Terpenning, 122 N. Y. 222.

[394] As to what constitutes an order staying proceedings within this rule, see Wilder v. Ballou, 63 Hun, 118.

[395] A stay of proceedings pending appeal from a judgment of the marine court is a "statutory prohibition" and the time of such stay is not part of the year after reversal of the judgment, limited for the bringing of a new action. Worster v. Forty-second St. & G. St. Ferry R. Co., 6 Daly, 528.

[396] Code Civ. Proc. § 406.

[397] Wilkinson v. First Nat. Fire Ins. Co., 72 N. Y. 499.

[398] See ante.

[399] Thus, where a receiver of a trust company was sued in replevin by a corporation which had deposited executed securities with the trust company as collateral for an unpaid loan, and the corporation recovered judgment for the possession of the securities, which judgment was reversed on appeal, and on a new trial the receiver prevailed and thereupon sued the corporation on the securities which had long been due, the statute of limitations was not suspended during the time when, according to the first judgment, the corporation was entitled to possession. Best v. Davis Sewing Mach. Co., 65 Hun, 72, 47 State Rep. 353, 22 Civ. Proc. R. (Browne) 362.

However, it has been held that where a party in an equitable action as to the title to land, fails as to the title, and is accordingly required to account as to the rents and profits received by him, the

As examples of stays by "statutory prohibition" may be mentioned a statute prohibiting an action against a municipal corporation within thirty days after the written presentation of the demand of the comptroller,[400] and the statute against suits pending proceedings in bankruptcy.[401] So the period of three years elapsing after the death of the testator, during which the right to bring an action to recover from the devisees the amount of a debt of the testator is suspended, is not to be counted as part of the time limited by the statute, that being a case where the commencement of the action is stayed by "statutory prohibition."[402] Likewise, if there is no person in being against whom a claim may be enforced, as where a person dies and letters testamentary are not taken out for several years, there is, in effect, a "statutory prohibition."[403] And where the statute prohibits an action by a creditor of an estate until after an accounting by the executors or administrators, there is a "statutory prohibition."[404] It has been held that where, by any form of proceedings, the property of a debtor is taken possession of by the court, to be administered for the benefit of all his creditors, the statute does not run against any

statute does not apply for the period pending the litigation. Taylor v. Taylor, 43 N. Y. 578.

[400] Brehm v. City of New York, 104 N. Y. 186.

[401] Von Sachs v. Kretz, 10 Hun, 95.

When pendency of proceedings in bankruptcy is set up against the statute of limitations, it need not be shown that the bankruptcy court had jurisdiction, but only that it entertained the proceedings, and that the bankrupt himself made an application for his discharge and required the court to pass upon the question of his right to obtain it. Rosenthal v. Plumb, 25 Hun, 336.

[402] Adams v. Fassett, 149 N. Y. 61; Burnham v. Burnham, 27 Misc. 106; Mead v. Jenkins, 29 Hun, 253.

[403] Hall v. Brennan, 64 Hun, 394, 46 State Rep. 777, which held that where the testator died one month before the statute of limitations expired on a note made by him, and owing to a contest over his will letters testamentary were not issued until the lapse of more than eighteen months after his death, as there was no person against whom suit could be brought, the time intervening before the issue of letters was not to be regarded as part of the time limited for the commencement of an action. See, also, Matter of Howard's Estate, 11 Misc. 224.

[404] Mead v. Jenkins, 95 N. Y. 31.

debts not barred at the time possession of the property was taken by the court.[405]

§ 500. Absence from the state.

The Code provides for a deduction of time (a) when a person is without the state at the time a cause of action accrues against him and (b) when a person departs from the state, after a cause of action accrues against him and remains absent a year or more.[406] The statute provides, however, that these rules shall not apply where a designation of a person upon whom process may be served has been made by a resident during his absence from the United States, or by a foreign corporation.[407] Nor does the statute revive any cause of action barred by the statute, as it existed prior to its passage.[408]

Under the first provision, limitations do not commence to run against a person without the state when the cause of action accrues, until he returns to the state,[409] and such return must, in order to set the statute running, be public or notorious, so that plaintiff either knew of the return or with due diligence could have ascertained it and served process.[410] A foreign corporation is a person without the state within this rule.[411]

[405] Ludington v. Thompson, 4 App. Div. 117, 74 State Rep. 110.

[406] Code Civ. Proc. § 401.

This provision is founded on section 100 of the old Code. For note based on this section, see 1 Ann. Cas. 212.

This rule applies to special limitations by statute or contract. Hayden v. Pierce, 144 N. Y. 512.

Where the cause of action accrued during the revolutionary war, and defendant, before it accrued, left his home and joined the British army, and remained under the protection thereof, in a portion of the state which that army had conquered, it was held that during such time, though he was, in fact, within the territory of the state, he must be adjudged to have been "without the state" in the sense of the statute, for he was out of its jurisdiction. Sleght v. Kane, 1 Johns. Cas. 76.

[407] Code Civ. Proc. § 401.

[408] This amendment to section 401 was added by L. 1896, c. 665.

[409] This rule applies to non-residents. Mayer v. Friedman, 7 Hun, 218.

[410] Palmer v. Bennett, 83 Hun, 220, 64 State Rep. 157, 1 Ann. Cas. 208, 31 N. Y. Supp. 567.

A resident of the state of New Jersey, having an office in the city

Under the second provision, a departure from the state for a year or more stays the running of limitations until a return. Until the amendment of 1896, not only a departure from the state but also a "residence" without the state was necessary to stop the running of the statute.[412] Hence decisions distinguishing between "residence" and "domicile"[413] and decisions determining what constitutes a "residence" without the state, within this rule,[414] are inapplicable. It is only necessary that the person liable, depart from the state "after the cause of action accrues" and remain "continuously" absent therefrom for one year or more. But while he must remain "continuously" absent for one year or more,[415] yet nonresidence is absence and casual visits to the state do not destroy the continuity of such absence,[416] though if defendant resides in another state but has an office in New York city where he daily

of New York, at which he daily transacts business, is within the rule that "an open and notorious coming into this state, so that the creditor, by the exercise of ordinary diligence, might cause process to be served upon him, is sufficient to set the statute running." Costello v. Downer, 19 App. Div. 434, which explains the apparently contradictory cases of Bennett v. Cook, 43 N. Y. 537, and Riker v. Curtis, 17 Misc. 134 as proceeding on the theory that defendant's daily coming into the city to attend his business set the statute running in his favor but that his daily departures operated to stay it under the second clause of the statute as it then stood but which has now been changed so as to require "continuous absence for a year."

A dentist's assistant not having a sign out, and not putting his name in the directory, in the absence of any evidence that he had had permission to put out a sign and had declined, or that he had refused to allow his name to be put in the directory, cannot be said to have kept himself concealed or his whereabouts a secret, so as to suspend the running of the statute of limitations. Campbell v. Post, 20 Misc. 339, 79 State Rep. 919, 45 N. Y. Supp. 919.

411 See ante.

412 Hart v. Kip, 148 N. Y. 306, is a case decided before the amendment of 1896 which is not an authority now because of such amendment.

413 Bennett v. Watson, 21 App. Div. 409.

414 Matter of Austen, 13 App. Div. 247.

415 Costello v. Downer, 19 App. Div. 434.

416 Connecticut Trust & Safe Deposit Co. v. Wead, 172 N. Y. 497; Martin v. Platt, 51 Hun, 429, 21 State Rep. 330; First Nat. Bank of Lockport v. Bissell, 24 State Rep. 909, 7 N. Y. Supp. 53.

transacts business, the continuity of his absence is broken.[417] The provision for deducting the time of absence from the state is not affected by the fact that the court may proceed against the defendant by publication[418] and the rule applies to actions to foreclose a mortgage.[419]

The absence of one of several joint debtors from the state suspends the running of the statute against him, although the other has remained within the state,[420] but it does not suspend the running of the statute as to the latter.[421]

A decision of the court of appeals[422] that a defendant who had fled from a foreign country could plead successfully his residence here for six years as a bar under our statute, notwithstanding he resided here under an assumed name for the purpose of concealing himself from his creditors, gave rise to an amendment in 1888 precluding a defendant who resides within the state under a false name from availing himself of our statute.[423]

§ 501. Death as suspending running of limitations.

The Code provides specifically as to the effect, on the statute of limitations, of the death of the person in whose favor a cause of action exists or of the person liable. These provisions may be briefly tabulated as follows:

—— **(1) Death of person liable without the state.** Death, without the state, of person against whom cause of action exists. Effect: suspension of statute from the time of death until eighteen months after the issuance within the state of letters testamentary or letters of administration.[424]

417 Costello v. Downer, 19 App. Div. 434.
418 Simonson v. Nafis, 36 App. Div. 473.
419 Osborne v. Randall, 7 Civ. Proc. R. (Browne) 323; Simonson v. Nafis, 36 App. Div. 473.
420 Hixson v. Rodbourn, 67 App. Div. 424; Denny v. Smith, 18 N. Y. 567; Bogert v. Vermilya, 10 N. Y. (6 Seld.) 447.
421 Brewster v. Bates, 81 Hun, 294, 62 State Rep. 744.
422 Engel v. Fischer, 102 N. Y. 400.
423 L. 1888, c. 498, amending Code Civ. Proc. § 401.
424 Code Civ. Proc. § 391.

—— (2) **Death of person liable within the state.** Death, within the state, of person against whom cause of action exists or who has been sued within sixty days: Effect: suspension of statute for eighteen months and if letters testamentary or letters of administration are not issued at least six months before the expiration of the time to sue as extended by eighteen months, then suspension for another year.[425] But the running of the statute is suspended for this additional year only where the letters are not issued six months or more before the expiration of the time, including the eighteen months, within which the action may be brought, not in a case where letters are not issued within six months before the expiration of the eighteen months from the time of death.[426] Nor does the extension of one year apply if the letters are not issued until after the claim is barred by the expiration of the regular period of limitation with eighteen months added thereto.[427] It is essential, however, to distinguish between cases where the statute has commenced to run against a claim before the death of the decedent and where it has not commenced to run at that time. In the former case, the failure to appoint an administrator does not suspend the running of the statute but merely extends the time in which an action must be brought; in the latter case, the statute does not commence to run until the appointment of a legal representative of the estate.[428] This eighteen month rule does not apply to the conclusive presumption of payment of a judgment after the lapse of twenty years.[429]

In 1896, it was further enacted that the time during which an action is pending in a court of record between a person or per-

[425] Code Civ. Proc. § 403.

In computing the time, the period of eighteen months must be added from the time of the death, and thereafter the number of days in the current year which the statute had still to run at the time of the death, even if the aggregate, owing to the different lengths of the months, exceeds the period of seven years and six months. Hall v. Brennan, 140 N. Y. 409.

[426] Church v. Olendorf, 49 Hun, 439, 19 State Rep. 700.

[427] Chapman v. Fonda, 24 Hun, 130.

[428] Matter of Howard's Estate, 11 Misc. 224; Hall v. Brennan, 64 Hun, 394, 46 State Rep. 777, 19 N. Y. Supp. 623.

[429] Matter of Kendrick, 107 N. Y. 104.

sons and an executor or administrator, wherein the person or persons claim to recover from the executor or administrator any money or other property claimed by said executor or administrator to belong to the estate of the decedent, or is embraced in the inventory of the assets of said decedent's estate, is not a part of the time limited for the commencement of an action against an executor or administrator, for a claim against the estate of the decedent until the final determination of the action brought to recover said or other property, claimed by said executor or administrator to belong to said decedent's estate:

1. Where the claim against the estate of the decedent is liquidated by the recovery of a judgment thereon against an executor or administrator in an action in a court of record or under section twenty-seven hundred and eighteen of this Code, after trial on the merits.

2. Where the legatee brings an action, or institutes a proceeding, against an executor or administrator with the will annexed, to enforce the payment of a legacy.[430]

—— **(3) Death of person entitled to sue.** Death of person entitled to sue before period of limitation expires. Effect: suspension of statute for one year.[431] But if a person entitled to maintain an action dies more than a year before the expiration of the time limited for the commencement of the action, this provision does not extend the time within which the action may be commenced by his representatives.[432]

§ 502. New action after reversal, dismissal or non-suit.

If an action is commenced within the time limited therefor, and a judgment therein is reversed on appeal [without awarding a new trial, or the action is terminated in any other manner than by a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action,[433] or a final judgment

[430] L. 1896, c. 897, amending Code Civ. Proc. § 403.

[431] Code Civ. Proc. § 402.

[432] Tompkins v. Austin, 10 State Rep. 339.

[433] Where an action is dismissed for failure of the plaintiff to pay costs awarded against him, as a condition to the withdrawal of a

upon the merits], the plaintiff, or, if he dies, and the cause of action survives, his representative, may commence a new action for the same cause, after the expiration of the time so limited, and within one year after such a reversal or termination.[434] The words in brackets were not contained in the old Code. This rule applies to special proceedings in a surrogate's court,[435] but does not apply to actions instituted in a federal court.[436] It will be noticed that the second action must be for the same cause. The rule was intended to remove the disability whenever a new suit was brought within the year, based upon the same transaction as the former one without regard to its technical form, and was intended in part to prevent mere mistakes as to the form of the remedy from concluding the party from subsequently pursuing his legal right under a more appropriate form of action. The fact that the first action was in tort and the second upon contract but based upon the same transaction, is therefore immaterial.[437]

It would seem that if the judgment be reversed by an appellate court and there is a subsequent appeal to a higher appellate court, the action may be brought within one year from the time of the affirmance by the latter court of the reversal by the other court.[438]

juror and a postponement of the trial, it is a dismissal for a neglect to prosecute (Hayward v. Manhattan Ry. Co., 52 Hun, 383, 17 Civ. Proc. R. (Browne) 155, 24 State Rep. 357), but a nonsuit ordered in a partly tried cause, on the refusal of plaintiff's attorney to proceed because his request for leave to amend the complaint in a necessary point has been denied, is not a dismissal of the complaint for neglect to prosecute. Marx v. Manhattan Ry. Co., 24 Abb. N. C. 62.

[434] Code Civ. Proc. § 405.

This Code rule has been held to not apply to an action authorized by a special statute which prescribes a particular limitation. Hill v. Board Sup'rs of Rensselaer County, 119 N. Y. 344. But it seems that this case has been overruled in so far at least as it applies to actions where the period of limitation is not an inherent part of the action, by Hayden v. Pierce, 144 N. Y. 512; Titus v. Poole, 145 N. Y. 414 (Opinion of lower court in 60 Hun, 1, attempts to distinguish earlier case).

[435] Matter of Schlesinger, 24 Misc. 456.

[436] Solomon v. Bennett, 62 App. Div. 56.

[437] Titus v. Poole, 145 N. Y. 414.

[438] Wooster v. Forty-Second St. & G. St. Ferry R. Co., 71 N. Y. 471.

§ 503. Persons under disabilities.

As before stated, it is a general rule that statutes of limitation are applicable to persons under disabilities unless expressly excepted,[439] but the statute permits certain persons under disabilities to bring the action within a specified time after their disabilities are removed. The Code excepts infants, insane persons, and persons imprisoned on a criminal charge or in execution upon conviction of a criminal offense, for a term less than for life.[440] Even such disabilities can not be counted, however, where the action is for a penalty or forfeiture or against a sheriff or other officer for an escape.[441]

The effect of such disabilities existing at the time when the cause of action accrues, is to exclude the time of such disability from the computation except that the time so limited cannot be extended more than five years by any such disability, except infancy, or in any case, more than one year after the disability ceases.[442] Hence, the provision for one year after an infant becomes of age, applies only to cases where the statutory period would expire before the termination of that one year.[443]

The disability of an infant is not affected by the fact that before coming of age he brings an action by his guardian ad litem[444] or by the fact that he has a guardian who might have brought the action.[445]

On the other hand, legal liabilities may be enforced "against" lunatics, idiots, infants, etc., and hence the fact that they are not in all respects sui juris has not been regarded as a reason

[439] Levy v. Newman, 130 N. Y. 11.

[440] Code Civ. Proc. § 396.

[441] Code Civ. Proc. § 396.

[442] Code Civ. Proc. § 396.

[443] Jagau v. Goetz, 11 Misc. 380, 65 State Rep. 292; Hyland v. New York Cent. & H. R. R. Co., 24 App. Div. 417, 5 Ann. Cas. 159; Matter of Rogers' Estate, 153 N. Y. 316.

This holding, however, is in conflict with the rule laid down in Howell v. Leavitt, 95 N. Y. 617 and followed by Darrow v. Calkins, 154 N. Y. 503 as to actions for the recovery of real property where plaintiff is an infant at the time the cause of action accrues.

[444] Geibel v. Elwell, 91 Hun, 550, 70 State Rep. 812.

[445] Torrey v. Black, 3 Wkly. Dig. 131.

for extending the time allowed by statute for commencing actions against them.[446]

Where an action by an executor or administrator to recover personal property taken after the death and before issuance of letters or to recover damages for taking or injuring personalty under like conditions, is barred, any of the next of kin, legatees, or creditors, who, at the time of the transaction upon which it might have been founded, was within the age of twenty-one years, or insane, or imprisoned on a criminal charge, may, within five years after the cessation of such a disability, maintain an action to recover damages by reason thereof, in which he may recover such sum, or the value of such property, as he would have received upon the final distribution of the estate, if an action had been seasonably commenced by the executor or administrator.[447]

—— **Married women.** Coverture is no longer a disability which prevents the running of the statute.[448]

—— **Disability must exist when right of action accrues.** A person cannot avail himself of a disability unless it existed when his right of action or of entry accrued.[449] This rule prevents the tacking of successive disabilities.

—— **Cumulative disabilities.** Where two or more disabilities co-exist, when the right of action or of entry accrues, the limitation does not attach until all are removed.[450] This statutory rule changes the common law rule.

§ 504. War.

Where a person is disabled to sue in the courts of the state, by reason of either party being an alien subject or citizen of a country at war with the United States, the time of the continuance of the disability is not a part of the time limited for the commencement of the action.[451]

446 Sanford v. Sanford, 62 N. Y. 553, which held that the idiocy of a debtor did not suspend the running of the statute.

447 Code Civ. Proc. § 392.

This rule was applied in Lynch v. Lynch, 89 Hun, 112.

448 Cleveland v. Crawford, 7 Hun, 616.

449 Code Civ. Proc. § 408.

450 Code Civ. Proc. § 409.

451 Code Civ. Proc. § 404.

§ 505. Termination of action by dismissal, discontinuance or death, as affecting limitations applicable to defense or counterclaim.

Where a defendant in an action has interposed an answer, in support of which he would be entitled to rely, at the trial, upon a defense or counterclaim then existing in his favor, the remedy upon which at the time of the commencement of the action, was not barred; and the complaint is dismissed, or the action is discontinued, or abates in consequence of the plaintiff's death; the time which intervened between the commencement and the termination of the action, is not a part of the time limited for the commencement of an action by the defendant, to recover for the cause of action so interposed as a defense, or to interpose the same defense in another action brought by the same plaintiff, or a person deriving title from or under him.[452]

§ 506. Revocation of submission to arbitration or stay of remedy on award.

Where the persons, who might be adverse parties in an action, have entered into a written agreement to submit to arbitration, or to refer the cause of action, or a controversy in which it might be available, or have entered into a written submission thereof to arbitrators; and before an award, or other determination thereupon, the agreement or submission is revoked, so as to render it ineffectual, by the death of either party thereto, or by the act of the person against whom the action might have been brought; or the execution thereof, or the remedy upon an award or other determination thereunder, is stayed by injunction, or other order procured by him from a competent court or judge; the time which has elapsed, between the entering into the written submission or agreement, and the revocation thereof, or the expiration of the stay, is not a part of the time limited for the commencement of the action.[453]

[452] Code Civ. Proc. § 412. The reason for the enactment of this rule is self-evident. See Cohn v. Anathan, 24 State Rep. 295.

[453] Code Civ. Proc. § 411.

ART. V. TIME OF COMMENCING ACTION.

§ 507. General rules.

Limitations do not run after the commencement of an action.[454] An action is commenced, as to any particular defendant, when the summons is served on him personally. The service of one defendant does affect a co-defendant unless the latter is a joint contractor or otherwise united in interest with the defendant served.[455] Thus an action on a partnership demand is commenced as to all of defendants by service on one of the defendants[456] but service on a purchaser of land in an action to foreclose a mechanic's lien is not the commencement of an action against the seller if there is no joint interest between them.[457]

One joining in an action commenced by another for himself and others similarly situated is regarded as an original plaintiff and the action is as to him commenced by the service of the summons in the first instance.[458] The statute does not require the service of a new summons on the filing of an amended complaint stating the cause in substance as in the original complaint.[459]

In claims which are litigated without formal pleadings, such as claims against the estate of a deceased person, the entry of the order of reference is deemed the date of the commencement of the action for the purpose of the application of the statute of limitations.[460] But necessary preliminaries to an action such as the presentation of a claim to a municipality do not amount to the commencement of an action within the statute.[461]

[454] Evans v. Cleveland, 72 N. Y. 486; Hawley v. Whalen, 64 Hun, 550, 46 State Rep. 512.

[455] Code Civ. Proc. § 398; Howell v. Dimock, 15 App. Div. 102.

[456] Bennett v. Watson, 21 App. Div. 409.

[457] Moore v. McLaughlin, 11 App. Div. 477, 76 State Rep. 256.

[458] Brinckerhoff v. Bostwick, 99 N. Y. 185.

[459] Logeling v. New York El. R. Co., 5 App. Div. 198.

[460] Leahy v. Campbell, 70 App. Div. 127; Hultslander v. Thompson, 5 Hun, 348.

[461] Brehm v. City of New York, 104 N. Y. 186.

A reference of a disputed claim against an estate under Rev. St.

§ 508. Attempts equivalent to commencement—In courts of record.

An attempt to commence an action, in a court of record, is equivalent to the commencement thereof against each defendant, when the summons is delivered, with the intent that it shall be actually served, to the sheriff, or the coroner where the sheriff is a party, of the county in which that defendant, or one of two or more co-defendants who are joint contractors or otherwise united in interest with him, resides or last resided.[462] If defendant is a corporation, delivery to a like officer of the county, in which it is established by law, or wherein its general business is or was last transacted, or wherein it keeps or last kept, an office for the transaction of business will suffice as an attempt.[463] Delivery of a summons against one corporation will not, however, avail as service against another having a similar name.[464]

This Code rule applies, however, only to defendants who were parties to the action, at the time of such delivery, or who were made parties before the statute had run against the claim upon which the action was brought. Such delivery of the summons does not prevent the running of the statute in favor of persons who, although liable upon the obligation in suit, were not named as defendants in the summons; and it is immaterial whether the omission was by design or through ignorance, mistake, or inadvertence. So, also, where, by order amending the summons, a new party defendant is brought in, the suit is com-

p. 88, § 36, has been held a commencement for purposes of determining whether the action was brought within the time limited. Hultslander v. Thompson, 5 Hun. 348.

[462] Code Civ. Proc. § 399.

The common law provision is that an action is commenced when the writ is issued and in good faith mailed to the sheriff for service. Gough v. McFall, 31 App. Div. 578.

Proof that the summons was lodged with the sheriff within the six years for service on defendant without further proof that defendant was at the time a resident of the same county does not prevent the operation of the statute. Riker v. Curtis, 10 Misc. 125, 62 State Rep. 514, 30 N. Y. Supp. 940.

[463] Code Civ. Proc. § 399.

[464] Shaw v. Cock, 78 N. Y. 194.

menced as to him only when he was brought in; and if, between the time of the commencement of the action as to the original parties and the time when the new defendant was brought in, the period of limitation had expired, a plea of the statute in bar of his liability is good.[465]

The attempt must be followed, within sixty days after the expiration of the time limited for the actual commencement of the action, by personal service on defendant sought to be charged, or by the first publication of the summons pursuant to an order for service upon him in that manner.[466] It was the intent of the legislature that the bar should be dependent upon the actual commencement of the action and not upon the manner in which the summons should be served and hence "substituted service" satisfies the requirement of service by publication.[467] Where the attempt to serve is defeated by the death of the party before the sixty days the attempt is not rendered nugatory but will save the bar of the statute up to the date of defendant's death after which it is further suspended for eighteen months by section 403 of the Code.[468]

—— **In courts not of record.** The Code rules just stated as to an attempt to commence an action in a court of record excluding the provision requiring a publication of service of the summons within sixty days, apply to an attempt to commence an action in a court not of record where the summons is delivered to an officer authorized to serve the same, within the city or town wherein the person resides or the corporation, is located; provided that actual service thereof is made with due diligence.[469] It is necessary that a justice's summons should show the residence of defendant otherwise it will not appear that the summons was delivered to an officer authorized to serve it in the town of defendant's residence.[470] But this does not re-

[465] **Shaw v. Cock,** 78 N. Y. 194, which was a decision under the old Code provision which was substantially the same as the present provision.

Merritt v. Sawyer, 6 Thomp. & C. 160; Merritt v. Scott, 3 Hun, 657.

[466] Code Civ. Proc. § 399.

[467] Clare v. Lockard, 122 N. Y. 263.

[468] Riley v. Riley, 141 N. Y. 409.

[469] Code Civ. Proc. § 400.

[470] Quick v. Leigh, 35 State Rep. 712, 20 Civ. Proc. R. (Browne) 147.

quire that the summons shall be delivered to a constable of the town in which defendants reside but to a constable authorized to serve the summons in the town in which defendants reside.[471] The issuance of a summons will not relate back to the time of earlier summons "dismissed" by the parties in the justice's court.[472]

§ 509. Application of Code rules to contract limitations.

The Code rules heretofore stated as to when an action is deemed commenced and what constitutes the equivalent thereof, apply to limitations provided for by contract as well as those provided for by statute.[473]

ART. VI. ACKNOWLEDGMENT, NEW PROMISE, AND PART PAYMENT.

(A) ACKNOWLEDGMENT OR NEW PROMISE.

§ 510. Preliminary considerations.

A case may be taken out of the operation of the statute of limitations only by (1) an acknowledgment, (2) a promise, or (3) a part payment. The Code expressly provides that an acknowledgment or promise contained in a writing signed by the party to be charged thereby is the only competent evidence of a new or continuing contract whereby to take a case out of the operation of the statute; but this rule does not alter the effect of a payment of principal or interest.[474] This Code rule is practically a re-enactment of the rule laid down by the old Code.[475] The difference between a "promise" and an "acknowledgment" is that the one refers to an express promise and the other to acts raising an implied promise to pay. An acknowledgment of indebtedness is not of itself a promise but simply evidence from which a promise may be inferred.[476]

471 Davison v. Budlong, 40 Hun, 245.
472 Finan v. O'Dowd, 6 App. Div. 268, 75 State Rep. 371.
473 Hamilton v. Royal Ins. Co., 156 N. Y. 327; Gough v. McFall, 31 App. Div. 578.
474 Code Civ. Proc. § 395.
475 Code Pro. § 110.
476 Lane v. Doty, 4 Barb. 530.

§ 511. In what causes of actions effective.

Acknowledgments or new promises are practically limited, in effect, to actions based on contract where there is a debt.[477] They are inoperative in cases of tort.[478]

—— **Acknowledgment of liability under judgment or decree.** The presumption of payment of a money decree or judgment, where twenty years have expired, is conclusive, except as against one who, within the twenty years, makes a payment or acknowledges an indebtedness of some part of the amount recovered by the judgment or decree, or his heir or personal representative, or a person whom he otherwise represents.[479] Such an acknowledgment must be in writing and signed by the person to be charged thereby.[480]

§ 512. Necessity of signed writing.

Before the Codes a written promise or acknowledgment was not required.[481] Under the present Code, as already stated, the acknowledgment or new promise must be contained in a "writing" signed by the party to be charged thereby. The writing may consist of letters[482] or of an order on a third per-

[477] But the Code provides that if at any time before a claim of dower has been barred by the lapse of twenty years, the owner or owners of the lands subject to such dower, being in possession, shall have recognized such claim of dower by any statement contained in a writing under seal, subscribed and acknowledged in the manner entitling a deed of real estate to be recorded, or if by any judgment or decree of a court of record within the same time and concerning the lands in question, wherein such owner or owners were parties, such right of dower shall have been distinctly recognized as a subsisting claim against said lands, the time after the death of her husband, and previous to such asknowledgment in writing or such recognition by judgment or decree, is not a part of the twenty years. Code Civ. Proc. § 1596.

[478] Oothout v. Thompson, 20 Johns. 277. See, also, Elliot v. Cronk's Adm'rs, 13 Wend. 35.

[479] Code Civ. Proc. § 376.

[480] Code Civ. Proc. § 376.

[481] Gillespie v. Rosekrants, 20 Barb. 35; Winchell v. Hicks, 18 N. Y. 558; Van Alen v. Feltz, 4 Abb. App. Dec. 439, 1 Keyes, 332; Lansing v. Blair, 43 N. Y. 48.

[482] McNamee v. Tenny, 41 Barb. 495.

son for the amount of the debt.[483] It need not be dated.[484] There is a sufficient signing where it is evident from any part of the writing that the debtor has given his assent. It seems that the writing need not be "subscribed."[485]

§ 513. Time of acknowledgment or promise.

It is generally immaterial whether acknowledgment or promise be made before or after the statute of limitations has become a bar.[486]

§ 514. Who may acknowledge or promise.

The promise or acknowledgment must be by the party himself or his duly authorized agent.[487] There is no mutual agency between joint debtors by reason of their joint contract which will authorize one to act for and bind the others so as to vary their liability. Hence a subsequent promise or partial payment of one joint debtor, unless authorized by his co-debtors, does not take the debt out of the statute of limitations as to them.[488] This rule applies to partners.[489] Executors and administrators have no power to revive a claim already barred, by promise or acknowledgment,[490] except, perhaps, by an express promise to pay.[491]

[483] Manchester v. Braedner, 107 N. Y. 346.

In Heaton v. Leonard, 69 Hun, 423, 52 State Rep. 629, it was questioned whether a check merely tendered but not delivered was a "writing" within the statute.

[484] Kincaid v. Archibald, 73 N. Y. 189.

[485] Rowe v. Thompson, 15 Abb. Pr. 377.

[486] Shoemaker v. Benedict, 11 N. Y. (1 Kern.) 176, 186.

[487] Winchell v. Hicks, 18 N. Y. 558; Roosevelt v. Mark, 6 Johns. Ch. 266.

[488] Dunham v. Dodge, 10 Barb. 566; approved and adopted Shoemaker v. Benedict, 11 N. Y. (1 Kern.) 176; Bloodgood v. Bruen, 8 N. Y. (4 Seld.) 362; Winchell v. Hicks, 18 N. Y. 558.

[489] Talbot v. Rechlin, 2 City Ct. R. 420; City Nat. Bank v. Phelps, 86 N. Y. 484; Bloodgood v. Bruen, 8 N. Y. (4 Seld.) 362.

[490] Matter of Kendrick, 107 N. Y. 104; Matter of Bradley, 25 Misc. 261; Butler v. Johnson, 111 N. Y. 204.

Neither retention of a claim by an administrator and verbal admission of its validity (Cotter v. Quinlan, 2 Dem. Surr. 29) nor allowance

§ 515. To whom made.

Generally an acknowledgment of the debt to a third person not acting in the creditor's behalf will be insufficient,[492] unless it appears that the intention was that the declaration made to him should be communicated to and influence the creditor.[493]

—— **Assignment of claim after new promise.** A promise made to the creditor inures to benefit of a subsequent transferee.[494]

§ 516. Sufficiency of promise or acknowledgment.

As already stated there must be either an express promise or an acknowledgment of the debt from which an implied promise may be raised.[495] After a review of the decisions in this state, the general rule may be laid down that an acknowledgment or new promise, in order to be sufficient to take a case out of the statute, must be (a) definite, (b) unqualified and unconditional, (c) recognize an existing debt, and (d) show an intention to acknowledge the debt. The early rule in this state was that the acknowledgment must indicate both a liability and a "willingness to pay"[496] but the later cases hold

by an executor (Matter of Robbins' Estate, 7 Misc. 264, 58 State Rep. 526) will suffice to take a case out of the operation of the statute.

[491] Schutz v. Morette, 146 N. Y. 137.

[492] Fletcher v. Updike, 5 Thomp. & C. 513, 67 Barb. 364, 3 Hun, 350.

But acknowledgment of debt is sufficient if made to one who is acting for or in the interest of the creditor, and who may reasonably be expected to communicate it to him, and on which communication he may be expected to repose. Winterton v. Winterton, 7 Hun, 230.

[493] De Freest v. Warner, 98 N. Y. 217; Wakeman v. Sherman, 9 N. Y. (5 Seld.) 85; Carshore v. Huyck, 6 Barb. 583.

An acknowledgment of indebtedness not communicated to the creditor, but kept in the debtor's possession, is insufficient. Smith v. Camp, 58 Hun, 434, 35 State Rep. 568.

[494] Pinkerton v. Bailey, 8 Wend. 600; Dean v. Hewit, 5 Wend. 257.

[495] Winchell v. Hicks, 18 N. Y. 558; Van Keuren v. Parmelee, 2 N. Y. (2 Comst.) 527; Shoemaker v. Benedict, 11 N. Y. (1 Kern.) 185; Commercial Mut. Ins. Co. v. Brett, 44 Barb. 489.

[496] Bloodgood v. Bruen, 8 N. Y. (4 Seld.) 362.

If there is no express promise, and one is to be raised by implication of law from an acknowledgment, such acknowledgment should contain an unqualified and direct admission of a previous subsisting debt,

that a bare acknowledgment of the existence of the debt is sufficient as the law will imply or infer from its existence a promise to pay it.[497]

Within these rules a claim is taken out of the statute where the debtor acknowledges the justice of the claim and promises payment when its amount is determined;[498] or where, doubting the existence of the claim, he yet expresses a willingness to pay;[499] or where his promise is to pay installments if satisfactory;[500] or where, not questioning the existence of the claim, he expresses a desire to make satisfactory arrangements for its payment;[501] or where he admits that money would not have been loaned except for his credit and asks the holder of the note what he will take for it.[502] A letter from an administrator to his coadministrator saying "Inclosed I send a copy of the inventory taken yesterday" is a sufficient acknowledgment of an indebtedness on his notes to deceased inserted at the foot of the inventory;[503] and so is a direction in a will to pay a specific debt though a general direction for the payment of debts would not have that effect.[504] So a publication of unclaimed deposits remaining in a bank is an acknowledgment of indebtedness to depositors named, from which a new prom-

which the party is liable and willing to pay. If the accompanying circumstances repel the presumption of a promise or intention to pay; if the expressions are equivocal, vague, and indeterminate, leading to no certain conclusion, but at best to probable inferences which may affect different minds in different ways, they ought not to go to the jury as evidence of a new promise to revive the cause of action. Purdy v. Austin, 3 Wend. 187; Stafford v. Bryan, 3 Wend. 532; Hancock v. Bliss, 7 Wend. 267.

497 Henry v. Root, 33 N. Y. 526, a leading case which has been since followed.

498 McCahill v. Mehrbach, 37 Hun, 504. Acknowledgment of justice of debt, standing by itself, is insufficient. Davis v. Noyes, 61 Hun, 87.

499 Shaw v. Lambert, 14 App. Div. 265, 77 State Rep. 470.

500 Crandall v. Moston, 42 App. Div. 629, 59 N. Y. Supp. 146.

501 Kahn v. Crawford, 28 Misc. 572.

502 Cudd v. Jones, 63 Hun, 142, 44 State Rep. 131.

503 Clark v. Van Amburgh, 14 Hun, 557. The rule has been extended to a mere listing. Ross v. Ross, 6 Hun, 80.

504 Gilbert v. Morrison, 53 Hun, 442, 25 State Rep. 477.

ise will be implied.[505] A stipulation to not plead the statute of limitations is a sufficient acknowledgment [506] as is an appropriation by the legislature of money to pay a claim.[507] And it would seem that the act of the debtor in including a debt in his sworn inventory, under an insolvent act, would take the case out of the statute.[508] The acknowledgment may be in the form of an order on a third person to pay a specified sum to the person to whom the order is given.[509]

—— **Intention to pay.** The writing need not express an intention to pay the debt.[510] Nevertheless it is necessary that an acknowledgment be made under such circumstances that an express promise to pay may be fairly implied.[511] In other words, the writing must not only recognize an existing debt but must also contain nothing inconsistent with an intention on the part of the debtor to pay it.[512] For instance, an admission of having executed a note, saying at the same time that it was outlawed, and declaring an intention to rely on the statute of limitations, is not a sufficient new promise to take the case out of the statute.[513] So a letter written by an indorser of a note stating inability to pay the note but offering

505 Adams v. Orange County Bank, 17 Wend. 514.

506 Anderson v. Sibley, 28 Hun, 16. See, also, Shapley v. Abbott, 42 N. Y. 443.

507 Corkings v. State, 99 N. Y. 491.

508 Bryar v. Willcocks, 3 Cow. 159; Stuart v. Foster, 18 Abb. Pr. 305. But see 19 Am. & Eng. Enc. Law, 302, which states a contrary rule.

509 Manchester v. Braedner, 107 N. Y. 346.

510 McNamee v. Tenny, 41 Barb. 495.

511 Wakeman v. Sherman, 9 N. Y. (5 Seld.) 85, 91.

512 Manchester v. Braedner, 107 N. Y. 346.

513 Danforth v. Culver, 11 Johns. 146.

So a promise cannot be inferred from a declaration of defendant that he was not holden to pay anything, and that the contract could not be enforced at law, and that he never would pay anything, as it was an unjust debt. Laurence v. Hopkins, 13 Johns. 288.

Likewise a letter written by a debtor, in effect acknowledging the existence of an indebtedness, and proposing a compromise, but distinctly indicating an unwillingness to pay, and a determination to pay nothing if the offered compromise be rejected, is not such a recognition of the debt as will take it out of the statute. Loomis v. Decker, 1 Daly, 186; Creuse v. Defiganiere, 23 Super. Ct. (10 Bosw.) 122.

to buy it for some small sum that he can afford to pay, is not an acknowledgment of an existing debt.[514]

In a recent case the following language was used: "Whatever be the language used, if it is susceptible of a construction which fairly discloses an intention to recognize the claim, the acknowledgment is deemed sufficient within the statute, if not coupled with a refusal to pay or other conditions inconsistent with a purpose to do so; and where conditions are shown a compliance therewith may be shown."[515] The question usually depends on intention[516] determinable from a construction of the writing relied on.[517]

—— **Definiteness.** The promise or acknowledgment must be definite as to the debt or liability referred to and as to what the debtor will do but need not state the amount of the debt.[518] Parol evidence may be resorted to, however, in aid of the interpretation, as for the purpose of identifying the debt and its amount or to fix the date of the writing relied on as an acknowledgment.[519]

—— **Qualifications and conditions.** The acknowledgment or new promise must be unconditional and unqualified,[520] or else performance or the happening of the condition must be shown.[521] Thus where a debtor says he will pay as soon as

[514] Connecticut Trust & Safe Deposit Co. v. Wead, 172 N. Y. 497.

[515] Wright v. Parmenter, 23 Misc. 629.

[516] Shaw v. Lambert, 14 App. Div. 265 which held a letter stating, "I don't know if I can help you in the matter to look over these old figures together. I would prefer you make yourself a statement of your own. In my opinion, all what I remember is that these accounts were settled long ago. If not, I am willing to do so now. Please let me hear from you," etc., an acknowledgment or promise sufficient to take a demand out of the statute.

[517] Davis v. Noyes, 61 Hun, 87, 39 State Rep. 632; De Freest v. Warner, 30 Hun, 94; Fletcher v. Daniels, 52 App. Div. 67.

[518] Kahn v. Crawford, 28 Misc. 572.

[519] Manchester v. Braedner, 107 N. Y. 346; Kincaid v. Archibald, 73 N. Y. 189.

[520] Deyo's Ex'rs v. Jones' Ex'rs, 19 Wend. 491.

[521] Wakeman v. Sherman, 9 N. Y. (5 Seld.) 85; Watkins v. Jones, 63 Hun, 106, 44 State Rep. 163. This rule obtained before the adoption of the Codes. Bush v. Barnard, 8 Johns. 318; Dean v. Hewit, 5 Wend. 257; Allen v. Webster, 15 Wend. 284; Cocks v. Weeks, 7 Hill, 45; Tompkins v. Brown, 1 Denio. 247.

he conveniently can there can be no recovery without proof of his ability to pay.[522]

Casual statements by one that when he sold certain property he would pay a claim, not assented to so as to make an agreement to await such sale, will not amount to a new agreement[523] nor will an offer to pay in specific articles a debt payable in money unless the creditor assents.[524]

An unaccepted offer to compromise is insufficient as an acknowledgment[525] though a written stipulation to submit matters in controversy to an arbitrator named, and to waive the statute of limitations on the hearing before the arbitrator, has been held a sufficient written acknowledgment of the debt to remove the bar of the statute in an action brought to recover the claim after the revocation of the submission to arbitration.[526] So the tendering of a check for less than the amount claimed by plaintiff and more than defendant conceded to be due, by way of compromise, is not such an unqualified acknowledgment of the debt as takes it out of the statute.[527]

—— **Voluntary or involuntary act.** It is held that a compulsory acknowledgment is insufficient.[528] But a publication of unclaimed deposits remaining in a bank, is an acknowledgment of indebtedness to depositors named, from which a new promise will be implied, though such statement is required by law, since it might be so qualified as to repel inference of a promise.[529]

—— **Consideration of promise.** The new promise, it would seem, needs no consideration other than the moral obligation

[522] Tebo v. Robinson, 100 N. Y. 27; Cocks v. Weeks, 7 Hill, 45; Ingersoll v. Rhoades, Hill & D. Supp. 371; Allen v. Trisdorfer, 11 State Rep. 674; Watkins v. Jones, 63 Hun, 106, 44 State Rep. 163.

[523] Matter of Meehan, 29 Misc. 167.

[524] Bush v. Barnard, 8 Johns. 318.

[525] Laurence v. Hopkins, 13 Johns. 288; Sands v. Gelston, 15 Johns. 511; Creuse v. Defiganiere, 23 Super. Ct. (10 Bosw.) 122.

[526] Anderson v. Sibley, 28 Hun, 16. Otherwise in case of a mere offer to refer by an executor after an unqualified refusal to pay. Snell v. Dale, 43 State Rep. 498, 17 N. Y. Supp. 575.

[527] Heaton v. Leonard, 69 Hun, 423, 52 State Rep. 629.

[528] Bloodgood v. Bruen, 8 N. Y. (4 Seld.) 362; Commercial Mut. Ins. Co. v. Brett, 44 Barb. 489.

[529] Adams v. Orange County Bank, 17 Wend. 514.

arising out of the original debt inasmuch as the remedy and not the debt is affected by statutes of limitation.

—— **Construction of writing.** The writing claimed to be an acknowledgment of the debt should be liberally construed. The writing need not be a formal acknowledgment of the continued existence of the debt.[530]

§ 517. Effect.

An acknowledgment or new promise starts the statute of limitations anew. It fixes a new date from which the period of limitation is to be computed. The new promise and not the old debt is the measure of the creditor's right,[531] and hence the action must be sustained on the new promise though the original contract is the cause of action and the complaint counts on that as the ground of recovery.[532]

(B) PART PAYMENT.

§ 518. Common law rules govern.

The statute provides as to payment of principal or interest, as taking a case out of the operation of the statute, as follows: "But this section does not alter the effect of a payment of principal or interest."[533] Nothing else is said as to payments and hence the common law must be looked to for the rules governing payments. While the fact of a partial payment is only reliable as evidence of a promise or a fact from which a promise may be implied,[534] yet by making a part payment the debtor admits the debt in the most conclusive manner. In determining whether a transaction claimed to be a payment has had the effect of taking the case out of the statute of limitations, the true test is this: Would the transaction have supported a plea of payment if the creditor had brought

530 Wright v. Parmenter, 23 Misc. 629.
531 Hartley v. Requa, 17 Misc. 74.
532 Winchell v. Hicks, 18 N. Y. 558.
533 Code Civ. Proc. § 395.
534 Dunham v. Dodge, 10 Barb. 566; Shoemaker v. Benedict, 11 N. Y. (1 Kern.) 176.

an action.[535] Payment of interest is sufficient as a part payment.[536] Partial payments may be evidenced by new notes given from time to time for the amount remaining unpaid, instead of indorsing the payments upon the original note.[537]

§ 519. Payment on specific debt and application of payments.

In order to take a demand out of the statute, by a part payment, it must appear that the payment was made on account of the debt for which the action is brought.[538] It must be explainable only as a recognition and confession of the existing liability.[539] If it is uncertain or ambiguous whether a payment was made as an independent transaction between the parties, and not connected with bygone transactions, or whether it was made on account of some precedent and lapsed debt, no inference should be drawn of an admission thereby of the old debt.[540] Hence payment of other checks does not stop the operation of the statute against a cause of action on one dishonored.[541] Where a general payment is made by the debtor and a number of obligations exist between the parties the payment will not be applied to any particular claim so as to take it out of the statute of limitations.[542] But if there is only one

[535] Matter of Thompson, 5 Dem. Surr. 393, 8 State Rep. 751, 26 Wkly. Dig. 172.

[536] Matter of Consalus, 95 N. Y. 340; Steven v. Lord, 84 Hun, 353, 65 State Rep. 466, 32 N. Y. Supp. 309.

[537] Hamlin v. Smith, 72 App. Div. 601.

[538] Arnold v. Downing, 11 Barb. 554; Acker v. Acker, 81 N. Y. 143.

[539] Blair v. Lynch, 105 N. Y. 636.

It will not be presumed that a debtor making a general payment makes it with the intention of keeping alive a debt or demand which he does not know the creditor holds against him. Camp v. Smith, 16 State Rep. 267, 1 N. Y. Supp. 375.

[540] Adams v. Olin, 140 N. Y. 150.

[541] Viets v. Union Nat. Bank, 101 N. Y. 563.

[542] Camp v. Smith, 45 State Rep. 331, 18 N. Y. Supp. 523.

Where sales were made from time to time, separate bills being rendered for sales at each time, and payments made to apply specifically on particular bills, a claim for bills of goods sold more than six years prior to suit, and upon which no payment within that time had been made, was barred by the statute. Albro v. Figuera, 60 N. Y. 630.

A general payment on account does not save an item of the account

debt, a payment may be considered as a payment on such debt.[543] If services are continuous and no time is fixed for payment, a part payment will be applied, in the absence of any agreement to the contrary, to the general balance and not to the wages for any one year.[544]

§ 520. Part payment as distinguished from payment in full

The payment relied on as defeating the statute of limitations must be made as a part of a larger indebtedness and not intended to satisfy the whole of the demand. It must be made under such circumstances as to show a recognition of a larger debt remaining unpaid.[545]

from the statute of limitations, if the debtor, at the time of such payment, expressly repudiate such item. Peck v. New York & Liverpool U. S. Mail Steamship Co., 18 Super. Ct. (5 Bosw.) 226.

But an overpayment in the hands of creditors has been held to take subsequent obligations out of the statute. Belden v. State, 103 N. Y. 1.

So payment on a claim, exceeding any one item thereof, with no direction for the special application of the same nor circumstances from which such direction can be inferred, is effectual to avoid the statute of limitations. Bowe v. Gano, 9 Hun, 6.

And in the case of a running account, payments on the general bill within six years take the whole demand out of the statute. Crow v. Gleason, 48 State Rep. 912, 20 N. Y. Supp. 590.

[543] Matter of Baldwin, 11 App. Div. 551.

[544] Smith v. Velie, 60 N. Y. 106; Pursell v. Fry, 19 Hun, 595.

A claim for a balance remaining due for services rendered for many years under an agreement that the employer would pay a certain sum per year, is an entirety; and any payment made upon it during the most recent six years takes the entire balance out of the statute of limitations. Denise v. Denise, 110 N. Y. 562.

[545] Burdick v. Hicks, 29 App. Div. 205; Hartley v. Requa, 17 Misc. 74; Arnold v. Downing, 11 Barb. 554.

A payment, by a debtor, made and received by the express terms of the written acknowledgment of it, "in full of all demands," operates as a direct repudiation and denial of any further liability, and cannot operate to take the residue of a demand out of the statute of limitations. Berrian v. City of New York, 27 Super. Ct. (4 Rob.) 538.

If it be doubtful whether the payment was a part payment of an existing debt, more being admitted to be due, or whether the payment was intended by a party to satisfy the whole of the demand against him, the payment cannot operate as an admission of a debt so as to extend the period of limitation. Crow v. Gleason, 141 N. Y. 489.

§ 521. Involuntary payments.

An involuntary payment has no effect on the operation of the statute. Hence a part payment derived from a collateral security, without the assent of the debtor to it as a payment, is not alone sufficient as a new promise.[546] Nor is a payment under a surrogate's decree.[547]

§ 522. By whom made.

A payment which is to operate as an acknowledgment must be made by the debtor or by an agent having authority to make a new promise or to perform for the debtor the very act which is to be the evidence of a new promise.[548] But proof of payment by another person, without the debtor's knowledge, may be sufficient where the debtor ratifies the act.[549] The payment by one of several co-obligors will not revive the debt as against the others.[550] So a payment by heirs of a mortgagor

[546] Harper v. Fairley, 53 N. Y. 442. See also Blair v. Lynch, 105 N. Y. 636.

[547] Arnold v. Downing, 11 Barb. 554.

[548] Smith v. Ryan, 66 N. Y. 352; Kelly v. Weber, 27 Hun, 8; Bender v. Blessing, 91 Hun, 73.

But it is not necessary that a payment made by an agent should be with the identical funds furnished by his principal. Burnett v. Snyder, 45 Super. Ct. (13 J. & S.) 577.

[549] Huntington v. Ballou, 2 Lans. 120.

So where a payment of interest is made upon a note, by the maker, in the name of and as agent for an accommodation indorser, a subsequent recognition and approval of the act by the indorser, with full knowledge of the facts, is, as regards the statute of limitations, equally binding upon him as a payment made by himself. It is immaterial whose money is used in making the payment. First Nat. Bank of Utica v. Ballou, 49 N. Y. 155.

But the fact that a mortgagee told the mortgagor of a receipt of money and he made no reply, does not make the payment a payment by the latter. Acker v. Acker, 81 N. Y. 143.

[550] Boughton v. Harder, 46 App. Div. 352; Winchell v. Hicks, 18 N. Y. 558; Hulbert v. Nichol, 20 Hun, 454.

Payment of interest by one of a number of joint and several makers of a promissory note, while it prevents the running of the statute as to him, does not without express authority for the payment given by the other makers, affect the bar of the statute as to them. Bender v.

will not affect grantees of the mortgagor.[551] An assignee under a general assignment for benefit of creditors cannot make a payment which will operate as a new promise,[552] nor can an executor or administrator where the debt was barred in the lifetime of the decedent,[553] though the rule is otherwise where there is a subsisting enforceable obligation.[554] Payment by the payee of a note to an indorsee does not stop the operation of the bar of limitations in favor of the maker.[555] So partial payments by a corporation on a debt will not suspend the operation of the statute of limitations in favor of the directors as barring their liability for failure to file an annual report.[556]

——**Partners.** A partner cannot, after dissolution, bind his co-partner by part payment,[557] unless the payee was ignorant

Blessing, 82 Hun, 320, 64 State Rep. 79. See, also, Martin v. Hyde, 19 App. Div. 490.

Where one of two makers of a note signed as surety, payment by the other maker does not take the cause of action out of the statute as to the maker who signed as surety, unless such payment was authorized or ratified by him. Matter of Petrie, 82 Hun, 62.

[551] A payment on a mortgage made by the heirs of the mortgagor, who have inherited part of the mortgaged premises, made after the death of the ancestor, to protect their title, does not arrest the running of the statute as against the lien of the mortgage on a part of the lands embraced therein, conveyed by the mortgagor in his lifetime to a third person for full value, who assumed no duty and who was under no obligation to pay the mortgage debt. Murdock v. Waterman, 145 N. Y. 55.

[552] Pickett v. Leonard, 34 N. Y. 175.

[553] Hamlin v. Smith, 72 App. Div. 601; McLaren v. McMartin, 36 N. Y. 88.

[554] Matter of Dunn, 5 Dem. Surr. 124; Heath v. Grenell, 61 Barb. 190; Matter of Thompson, 5 Dem. Surr. 393. See, also, Matter of Campbell's Estate, 21 Misc. 133 where it was held that the general rule that a proceeding by a legatee for an accounting must be commenced within six years from the expiration of one year after the granting of letters testamentary, is subject to the exception that the running of the statute may be intercepted by the acts of the executor, and payment by the executor, the same as payment upon a debt by an individual, would bring the case within the exception.

[555] Woodruff v. Moore, 8 Barb. 171.

[556] Chapman v. Lynch, 156 N. Y. 551.

[557] Payne v. Slate, 39 Barb. 634; Hixson v. Rodbourn, 67 App. Div. 424.

of the fact of the dissolution.[558] A payment on account by a continuing partner who has assumed the partnership debts, does not take the case out of the statute as to the retiring partner.[559]

—— **Principal and surety.** Payment by the principal debtor does not affect the surety[560] unless the payment was authorized[561] or subsequently ratified[562] by the surety. And vice versa a part payment by a surety is not effective as a part payment by the principal.[563] Payment made by a principal, though after the surety has referred the payee to the principal for such payment, is not the act of the surety.[564]

§ 523. To whom made.

The rule before stated in regard to whom new promises and acknowledgments must be made, apply to part payments.[565] Part payment to one of two or more joint debtors may be relied on by the others.[566] So payments, on a debt which is barred by the statute, made to the widow of the creditor dying intestate, though made before she had taken out letters of administration, will take the debt out of the statute, so as to enable her to maintain a suit on it as administratrix, upon taking out letters.[567]

558 Forbes v. Garfield, 32 Hun, 389.

559 Gliddon v. Langdon, 22 Wkly. Dig. 74.

560 McMullen v. Rafferty, 89 N. Y. 456.

561 Matter of Petrie, 82 Hun, 62, 63 State Rep. 364; Haight v. Avery, 16 Hun, 252.

A surety on a note who urges the holder to collect it of the maker does not thereby confer any direct agency on the maker to pay for him, and he is not bound by a subsequent payment by the maker so as to arrest the running of the statute of limitations in his favor. Littlefield v. Littlefield, 91 N. Y. 203; distinguishing Winchell v. Hicks, 18 N. Y. 558.

562 A mere expression by a surety of gratification that his obligation on a debt is decreased, is not a ratification of a part payment thereon by the principal debtor. Littlefield v. Littlefield, 91 N. Y. 203.

563 Dempsey v. Dempsey, 16 Wkly. Dig. 257.

564 Littlefield v. Littlefield, 91 N. Y. 203; Smith v. Carpenter, 48 App. Div. 350.

565 See ante.

566 Carrington v. Crocker, 37 N. Y. 336.

567 Townsend v. Ingersoll, 12 Abb. Pr., N. S., 354.

§ 524. Medium of payment.

The medium of payment need not be money. Part payment may consist of the delivery of a note of a third person,[568] the rendition of services,[569] the transfer of a mortgage to apply in payment,[570] or the delivery of a life policy as collateral security for a note.[571] The allowance of a cross demand and indorsement thereof on a note as a part payment, is sufficient as a part payment,[572] as is reduction of a demand by agreement and the indorsement of such reduction as a payment.[573] But when a debtor gives his own note for a part of the debt, it can not be considered a part payment from the time of its actual payment to a transferee of the note.[574] Gifts of personal property will not operate as a part payment.[575]

§ 525. Time of payment.

It is usually immaterial whether the part payment be made before or after the statute of limitations has become a bar.[576] An agreement by the parties that a payment on a note shall not take effect as such until a later day, suspends the operation of the statute of limitations until the time so fixed,[577] but payment of interest in advance does not post date the operation of the statute.[578]

§ 526. Proof of payment.

Part payments may be proved by parol evidence[579] or by any other competent evidence such as indorsement of a part

568 Smith v. Ryan, 66 N. Y. 352.
569 Lawrence v. Harrington, 122 N. Y. 408.
570 Wiltsie v. Wiltsie, 12 State Rep. 144; Hitchcock v. Wiltsie, 6 Dem. Surr. 255.
571 Miller v. Magee, 17 State Rep. 547.
572 Hawley v. Griswold, 42 Barb. 18. See, also, Kelly v. Weber, 27 Hun, 8.
573 Bouton v. Hill, 4 App. Div. 251, 74 State Rep. 47.
574 Lawrence v. Baker, 44 Hun, 582.
575 Burnett v. Noble, 5 Redf. Surr. 69.
576 Shoemaker v. Benedict, 11 N. Y. (1 Kern.) 176, 186.
577 Dings v. Guthrie, 45 Hun, 436, 12 State Rep. 441.
578 McDonnell v. Blanchard, 5 Wkly. Dig. 410.
579 First Nat. Bank of Utica v. Ballou, 49 N. Y. 155.

payment on the evidence of debt by the debtor or by some person acting for him. But if the indorsement is made by the creditor, without the assent of the debtor, it must be proven that the indorsement was made before the claim was outlawed,[580] since there is no presumption that an indorsement in the handwriting of a creditor was made on the day it bears date.[581] This rule proceeds on the theory that if the indorsements are made before the statute has become a bar, they are admissions against interest but if made thereafter are self serving admissions.[582]

If the proof of payment of a judgment or decree, consists of the return of an execution partly satisfied, the adverse party may show in full avoidance of the effect thereof, that the alleged partial satisfaction did not proceed from a payment made, or a sale of property claimed, by him, or by a person whom he represents.[583]

[580] Purdy v. Purdy, 47 App. Div. 94; McLaren v. McMartin, 36 N. Y. 88. It has been suggested, that such an indorsement is, however, evidence against the maker that the payment was made, only in case of the death of the maker.

[581] Purdy v. Purdy, 47 App. Div. 94.

[582] Matter of Kellogg, 104 N. Y. 648.

[583] Code Civ. Proc. § 377. This provision was passed in pursuance of the decision in Henderson v. Cairns, 14 Barb. 15.

PART II.

PRACTICE RELATING TO ACTIONS GENERALLY, BUT NOT SUBJECT TO CHRONOLOGICAL ARRANGEMENT.

§ 527. Introduction.

Before taking up for consideration the various steps in an action, it is well to consider some of the general common law and Code rules which relate to matters not particularly applicable to any part of an action. For instance, if the Code provides that a certain act must be done within a certain time, it is often necessary that the rules for computation of time be looked up. So if a paper is to be served, other than a process, at any stage of the litigation, the rules as to the manner of service laid down by the Code apply, irrespective of what the paper is or how far the litigation has proceeded.

CHAPTER I.

AFFIDAVITS AND OATHS.

ART. I. AFFIDAVITS TAKEN WITHIN THE STATE, §§ 528-536.

ART. II. AFFIDAVITS TAKEN WITHOUT THE STATE, §§ 537-543.

ART. IV. OATHS, § 550.

§ 528. Definition.

An affidavit is defined as a statement or declaration reduced to writing, and sworn or affirmed to before some officer who has authority to administer an oath.[1] It has also been defined as a voluntary, ex parte statement, formally reduced to writing, and sworn to or affirmed before some officer authorized by law to take it.[2] The word "affidavit," as used in the Code, includes a verified pleading in an action or a verified petition or answer in a special proceeding.[3] It differs from a deposition in that it is always taken ex parte. It is not synonymous with "oath" but includes the oath. It is not a pleading. The terms "oath" and "affidavit," as used in any New York statute, include every mode authorized by law of attesting the truth of that which is stated.[4] The term "swear" includes every mode authorized by law of administering an oath.[5]

[1] Cyc. Law Dict. 36.
[2] 1 Enc. Pl. & Pr. 309, 310.
[3] Code Civ. Proc. § 3343, subd. 11.
[4] L. 1892, c. 677, § 14.
[5] L. 1892, c. 677, § 14.

§ 529. Formal requisites.

The formal requisites of an affidavit are the title, venue, signature, jurat, and authentication.[6] The facts set forth in an affidavit are generally paragraphed and numbered, to make the meaning clearer. Rule 25 of the General Rules of Practice requires that an affidavit exceeding two folios in length must be numbered and marked at each folio in the margin thereof, and all copies must be numbered or marked in the margin so as to conform to the original draft and to each other and must be indorsed with the title of the case. An affidavit contains no prayer for relief. In this respect it differs from a petition. The prayer for relief is contained in the notice of motion or the order to show cause.

The body of an affidavit ordinarily commences with a statement that "John Jones, being duly sworn, says," etc., and it is held that statements before the words "being duly sworn," are not part of the affidavit.[7]

—— **Title.** The affidavit should be entitled in the court and cause by showing who are the parties to the action, if an action has been commenced, and showing the court and county,[8] but an affidavit should not be entitled in a cause before the action is commenced,[9] though such an error will be disregarded by the court.[10]

The title of an affidavit embraces its entire heading, i. e. the name or style of the court as well as the names of the parties.[11]

[6] Beebe v. Morrell, 76 Mich. 114.

[7] Staples v. Fairchild, 3 N. Y. (3 Comst.) 41. However, a statement of the residence of the deponent, prior to such words, is sufficient where the statute does not expressly require such fact to be stated in the affidavit. People ex rel. Morgenthau v. Cady, 105 N. Y. 299.

[8] People ex rel. Kenyon v. Sutherland, 81 N. Y. 1; Burgess v. Stitt, 12 How. Pr. 401; Baxter v. Seaman, 1 How. Pr. 51.

[9] Babcock v. Kuntzsch, 85 Hun, 33.

So held of an affidavit made to accompany the writ in replevin. Stacy v. Farnham, 2 How. Pr. 26; Milliken v. Selye, 3 Denio, 54. Affidavit to move for mandamus must not be entitled. Haight v. Turner, 2 Johns. 371; People ex rel. Roddy v. Tioga Common Pleas, 1 Wend. 291.

[10] Pindar v. Black, 4 How. Pr. 95. Affidavit on motion for arrest may be entitled in the action. City Bank v. Lumley, 28 How. Pr. 397.

[11] Bowman v. Sheldon, 7 Super. Ct. (5 Sandf.) 657.

An affidavit in an action where there is more than one plaintiff or more than one defendant, is sufficient if it is entitled in the name of one plaintiff and of one defendant, with the words "and others" added. It is not necessary that the names of all the co-parties be given.[12]

Where the affidavit immediately follows the papers for the motion, or where it is indorsed upon them, they being properly entitled, it is sufficient, though not itself entitled. It is good by relation to the entitling of the principal papers.[13] Where an affidavit was entitled in two causes, one of which was rightly and the other wrongly stated, and the affidavit proceeded to speak of the cause, in the singular, it was sufficient.[14]

After an appeal is taken, affidavits relating thereto should be entitled in the appellate court.[15]

A motion may be denied where founded on an affidavit which is not entitled and which fails to show, either by naming the parties or otherwise, in what action it is made,[16] but the Code provides that the want of a title or a defect in the title of an affidavit, "if it intelligently refers to the action or special proceeding in which it is made," does not impair its validity.[17] Thus a misjoinder of parties in the title has been held not to vitiate the affidavit.[18] However, it has been held that an affidavit entitled in a cause which has no existence, will not be

[12] White v. Hess, 8 Paige, 544.

[13] Anonymous, 4 Hill, 597.

[14] Roosevelt v. Dale, 2 Cow. 581.

[15] Clickman v. Clickman, 1 N. Y. (1 Comst.) 611; Hawley v. Donnelly, 8 Paige, 415.

[16] Irroy v. Nathan, 4 E. D. Smith, 68.

[17] Code Civ. Proc. § 728; Lamkin v. Oppenheim, 86 Hun, 27; Bowman v. Sheldon, 7 Super. Ct. (5 Sandf.) 657; Blake v. Locy, 6 How. Pr. 108; Butterworth v. Boutilier, 50 State Rep. 828, 22 N. Y. Supp. 872.

The fact that an affidavit to obtain examination of a witness, in an action in the New York superior court, was entitled as in the supreme court, does not make the order and the deposition taken under it nullities, if it correctly described the court in which the action was pending, and in which it was designated to be read, and if it is sufficient in other respects. This part of the title, and similar matter in the title of the deposition, may be rejected as surplusage. Sheldon v. Wood, 15 Super. Ct. (2 Bosw.) 267.

[18] Cunningham v. Von Pustan, 56 Hun, 641, 9 N. Y. Supp. 255.

received though the causes are set forth by their true titles in the body of the affidavit.[19] It is submitted that this holding is wrong on principle. It was held at an early day that reversing the position of the parties in the title, i. e. making defendant plaintiff or vice versa, was a fatal defect[20] though it would seem that if the abbreviation "ads." be used the title would be sufficient, and that if the change could not mislead the opposing party, it should be disregarded.[21]

——**Venue.** The venue of an affidavit states the county in which it was taken. It is an essential part of an affidavit but its omission is amendable in furtherance of justice.[22] The venue of an affidavit is only prima facie evidence of the place where it was sworn to.[23] In the absence of a venue or statement in the jurat as to where it was taken, the affidavit would contain no evidence that it was sworn to within the jurisdiction of the officer administering the oath, and without evidence that it was taken by a proper officer within his jurisdiction it would be regarded as a nullity, unless the presumption would be that it was taken within his jurisdiction. But the omission does not invalidate the oath or render the affidavit a nullity when it is shown that it was duly administered by a proper officer within his jurisdiction, and the omission of the venue may be supplied by amendment.[24] An affidavit taken, as appears by the venue, without the county where the officer administering the oath is authorized to do so, cannot be read on a motion.[25]

——**Signature.** It is, of course, the better and safer practice for the person or persons making an affidavit, to sign it

[19] Humphrey v. Cande, 2 Cow. 509.

[20] Parkman v. Sherman, 1 Caines, 344.

[21] Hawley v. Donnelly, 8 Paige, 415.

[22] Cook v. Staats, 18 Barb. 407; Clement v. Ferenback, 1 City Ct. R. 57; Saril v. Payne, 4 N. Y. Supp. 897; McManus v. Western Assur. Co., 22 Misc. 269; Fisher v. Bloomberg, 74 App. Div. 368.

[23] Thurman v. Cameron, 24 Wend. 87.

[24] Babcock v. Kuntzsch, 85 Hun, 33; Smith v. Collier, 3 State Rep. 172; People ex rel. Mosher v. Stowell, 9 Abb. N. C. 456; Mosher v. Heydrick, 30 How. Pr. 161, 171; People ex rel. Morgenthau v. Cady, 105 N. Y. 299, 308.

[25] Davis v. Rich, 2 How. Pr. 86; Sandland v. Adams, Id. 127; Snyder v. Olmsted, Id. 181.

at the bottom, but the writing is an affidavit in law, though not signed by the deponent, if his name appear in the body of it, and it is duly sworn to,[26] though Chancellor Walworth held at an early day that an affidavit must be subscribed at the foot of it, giving as his reason that without it it would be difficult, if not impossible, to sustain a prosecution for perjury, especially where no persons other than the deponent and the officer were present when the former was sworn.[27] The only object of a signature or mark is to identify the affidavit sworn to, and hence persons incapable of making either a signature or mark by disease or natural infirmities or defects, are not debarred from making an affidavit.[28]

—— **Jurat.** The jurat is that part of an affidavit where the officer certifies that the same was "sworn" before him, and when and where.[29] When essential, the jurat must be given where without it facts stated may be unintelligible,[30] but the fact that an affidavit does not show that it was sworn to within the jurisdiction of the officer taking the affidavit, is not a fatal defect, since the presumption is that the officer acted within his proper jurisdiction.[31] A statement in the jurat "sworn before me," etc., is sufficient without stating that the affiant swore that the affidavit was true, since such fact will be presumed,[32] and where Jews make an affidavit, a jurat that they were "duly sworn" raises the presumption, in the absence of a showing to the contrary, that they were sworn in such a manner as to render the oath binding according to their conscience.[33] It cannot be claimed that the officer who took

[26] People ex rel. Kenyon v. Sutherland, 81 N. Y. 1; Haff v. Spicer, 3 Caines, 190; Jackson v. Virgil, 3 Johns. 540; Millius v. Shafer, 3 Denio, 60; Soule v. Chase, 24 Super. Ct. (1 Rob.) 222.

[27] Hathaway v. Scott, 11 Paige, 173.

[28] Soule v. Chase, 1 Abb. Pr., N. S., 48.

[29] Cyc. Law Dict. 512.

[30] Chase v. Edwards, 2 Wend. 283.

[31] This rule applies to an affidavit sworn to before a commissioner for a city (Parker v. Baker, 8 Paige, 428; People ex rel. Morgenthau v. Cady, 105 N. Y. 299) and also to an affidavit taken before a notary public (Mosher v. Heydrick, 45 Barb. 549; Crosier v. Cornell Steamboat Co., 27 Hun, 215).

[32] Crosier v. Cornell Steamboat Co., 27 Hun, 215.

[33] Fryatt v. Lindo, 3 Edw. Ch. 239.

the affidavit is not duly elected or appointed, where he is a de facto officer, since in such a case the court will not inquire into the validity of his appointment in a proceeding to which he is not a party.[34]

If the deponent is weak minded, blind, illiterate, or otherwise partially incapacitated, a special form of jurat is necessary. Thus the certificate of an officer before whom the petition of an alleged lunatic is sworn should state that the officer has examined the petitioner, for the purpose of ascertaining the state of his mind and whether he was capable of understanding the nature and object of the petition, and that he was apparently of sound mind, and capable of understanding it.[35] So if the deponent is blind, the officer should certify that the petition was carefully and correctly read over to him, in the presence of such officer, before he swore to the same.[36]

—— **Authentication.** The jurats of affidavits must be signed by the officer before whom the affidavit is made. This is the authentication. A paper signed by deponent, but having a jurat which is not subscribed by any one, is fatally defective.[37] Ordinarily the officer before whom an affidavit is made, adds to his signature the title of his office, but failure to add such statement does not affect the validity of the affidavit.[38] But an affidavit taken within the state before an officer qualified to take affidavits and certified by him, need not be further authenticated by the certificate of some other officer, that the officer taking the affidavit is such an officer as he purports to be and that he has power to take affidavits.

—— **Form of affidavit.**

[Name of court and county.]
———. Plaintiffs,
against
———. Defendants.
City and county of ———, ss.:

34 Crosier v. Cornell Steamboat Co., 27 Hun, 215.
35 Matter of Christie, 5 Paige, 242.
36 Matter of Christie, 5 Paige, 242.
37 Ladow v. Groom, 1 Denio, 429.
38 Hunter v. Le Conte, 6 Cow. 728.

A. X., being duly sworn, says that he is ——— [describe who deponent is and state his residence] and that [state facts].

[Signature.]

Subscribed and sworn to before me this ——— day of ———. 19—.

[Seal.] [Signature of officer and designation of office.]

§ 530. Sufficiency.

The test as to the sufficiency of an affidavit, is whether perjury may be assigned on it if false.[39] Thus an affidavit to redeem from a judicial sale which states the amount due, "as claimed by this deponent," is insufficient because perjury cannot be assigned thereon.[40] The addition of the words "to the best knowledge, information, and belief" of the deponent, does not impair its sufficiency, since the general rule is that an oath taken before a competent officer merely verifies the truth of the facts stated according to the best knowledge, information, and belief of the affiant.[41] So a statement in an affidavit made by one of several plaintiffs that "the plaintiffs aver" certain facts, is sufficient.[42]

—— **Statements on information and belief.** Hearsay evidence is generally excluded upon the trial of issues of fact in actions. As a rule, it is not good common law evidence. But in collateral proceedings or matters of practice, where orders in the progress of actions are applied for, judges frequently act upon facts stated upon information and belief. In such proceedings absolute certainty is not expected. The evidence is sufficient if convincing and satisfactory, is usually by affidavit, ex parte, and is not subjected to the test of cross-examination. All that is required is that the information furnished by the affidavit shall be such that a person of reasonable prudence would be willing to accept and act upon it. The mere averment, however, of a fact upon information and belief, without more, is not sufficient; but the sources of the information and the grounds of the belief must be stated so that the

[39] People ex rel. Kenyon v. Sutherland, 81 N. Y. 1, 8; People ex rel. Cook v. Becker, 20 N. Y. 354.

[40] People ex rel. Cook v. Becker, 20 N. Y. 354.

[41] Pratt v. Stevens, 94 N. Y. 387.

[42] Jamison v. Beecher, 4 Abb. Pr. 230.

judicial officer to whom the affidavit is presented may judge whether the information and belief have a proper basis to rest on; and if he is satisfied that they have, then the affidavit is sufficient to invoke his jurisdiction and to be submitted to his determination. The rule which requires an affidavit to state the sources of the information and the ground of belief, implies that with such statements the affidavit will be sufficient, although the affiant has no personal knowledge of the principal facts necessary to be established.[43] There is a distinction between "stating" the sources of information and "setting them forth." For example, if a deponent states as the sources of his information a letter written by one person to another or some other written instrument, and from such papers, inspected only by himself, he draws certain conclusions and swears to his belief in regard thereto, it is insufficient, since he should "set forth" his sources of information by stating the contents of the writings so that the judge may determine for himself whether the conclusions of the deponent are warranted by the facts.[44]

Where facts are positively affirmed, the affiant is not required to state the source of his knowledge or his means of information,[45] and an allegation that certain representations of defendant, set forth, were false, as deponent had since learned, may be regarded as a positive allegation of falsity, and not as one on information and belief.[46]

Statements in affidavits will be presumed to have been made on personal knowledge, unless stated to have been on information and belief, and unless it appears affirmatively and by fair inference that they could not have been and were not on such knowledge,[47] as where an affidavit in respect to a transaction

[43] Buell v. Van Camp, 119 N. Y. 160; Rome, W. & O. T. R. Co. v. City of Rochester, 46 Hun, 149; Mowry v. Sanborn, 65 N. Y. 584; Kuh v. Barnett, 57 Super. Ct. (25 J. & S.) 234; Martin v. Gross, 22 State Rep. 439; Whitlock v. Roth, 3 Code R. 142; Livingston v. Bank of New York, 5 Abb. Pr. 338. For note on affidavits on information and belief, see 2 Ann. Cas. p. 58.

[44] De Weerth v. Feldner, 16 Abb. Pr. 295.

[45] Pierson v. Freeman, 77 N. Y. 589.

[46] Cummings v. Woolley, 16 Abb. Pr. 297, note.

[47] Crowns v. Vail, 51 Hun, 204.

of his client is made by one who is simply an attorney of record in an action, and who, as far as the record shows, is only his attorney for the one action, in which case the plain inference is that such attorney has not personal knowledge of the facts as to which he affirms.[48] But where, from the situation of the parties, the presumption is that the affiant has not personal knowledge of the facts alleged, it is the duty of the court to reject the allegation unless the affiant set forth the facts and circumstances showing why he has personal knowledge,[49] by giving the name of the person from whom he received the information relied upon, or by furnishing his affidavit or explaining why such affidavit of corroboration is not furnished,[50] and the fact that an affiant states transactions positively as being within his knowledge, when it can be seen that he does not possess that knowledge, are circumstances not only requiring the statements to be rejected, but they tend to subject his veracity in other respects to grave doubts.[51] However, the rule is that an allegation made only on information and belief, without disclosing the source of information or the grounds of belief, is sufficient where there is no denial of such allegation anywhere in the opposing affidavits.[52]

——**Allegations of conclusions.** An affidavit should allege facts, and not conclusions which are merely the affiant's opinion. It is for the court to draw inferences and conclusions, and then only from facts proved.[53] In this respect an affidavit differs radically from a complaint, which should only set forth conclusions of fact and not the evidence of the correctness of these conclusions.[54]

[48] Crowns v. Vail, 51 Hun, 204.

[49] Brown v. Keogh, 39 State Rep. 225; Tim v. Smith, 93 N. Y. 91.

[50] Brown v. Keogh, 39 State Rep. 225.

[51] Thomas v. Dickinson, 33 State Rep. 786, 11 N. Y. Supp. 436.

[52] Finegan v. Eckerson, 32 App. Div. 233; Board Com'rs of Excise v. Purdy, 36 Barb. 266.

[53] Town of Duanesburgh v. Jenkins, 40 Barb. 574; Miller v. Oppenheimer, 2 City Ct. R. 408.

[54] Brown v. Keogh, 39 State Rep. 225; Mechanics' & Traders' Bank v. Loucheim, 29 State Rep. 188, 55 Hun, 396, 8 N. Y. Supp. 520; McCulloh v. Aeby & Co., 31 State Rep. 125, 9 N. Y. Supp. 361.

—— **Alternative statements.** Statements in an affidavit should not be in the alternative though it seems that such statements do not constitute a fatal defect where the remedy is precisely the same whether the one branch of the alternative or the other is true.[55] So sometimes it is held that if the affidavit follows the words of the statute it is sufficient, though in the alternative. This matter will come up for discussion in other chapters where the sufficiency of affidavits for a particular purpose is considered.

—— **Omission of name of deponent.** An affidavit usually starts out by giving the name of the affiant, the capacity in which he makes the affidavit, and the name of the place of his residence, but it is held that the omission of the name of a deponent in the body of an affidavit, when he subscribes it and it is complete in all other respects, is not fatal, except, it seems, in a case where the deponent makes oath in some special capacity.[56] So if the affidavit by plaintiff is properly entitled in the action and alleges that "he was the plaintiff above named," it is immaterial that the name of plaintiff is omitted at the commencement of the affidavit.[57]

—— **Showing compliance with statute.** When the affidavit, to be effectual, must be made by one having a certain character or personal capacity, wherein he acted or is to act in doing the matters averred therein, the paper must expressly state that the deponent has that character or capacity,[58] it being insufficient to merely name him therein with his title or character following the name.[59] For example, in such a case it is

[55] Van Alstyne v. Erwine, 11 N. Y. (1 Kern.) 331.

[56] People ex rel. Kenyon v. Sutherland, 81 N. Y. 1.

[57] Morrison v. Watson, 23 Wkly. Dig. 286.

[58] People ex rel. Kenyon v. Sutherland, 81 N. Y. 1; Ex parte Bank of Monroe, 7 Hill, 177; Ex parte Shumway, 4 Denio, 258; Staples v. Fairchild, 3 N. Y. (3 Comst.) 41.

[59] So held where affidavit was required to be made by an agent. Ex parte Bank of Monroe, 7 Hill, 177; People ex rel. Bank of Monroe v. Perrin, 1 How. Pr. 75; Ex parte Aldrich, 1 Denio, 662; Cunningham v. Goelet, 4 Denio, 71. So where affidavit is required to be made by an attorney (Ex parte Shumway, 4 Denio, 258), or where the affidavit is required to be made by a particular person in supplementary proceedings. Lindsay v. Sherman, 5 How. Pr. 308.

not sufficient to state that "Edward Smith, attorney for John Brown, being first duly sworn, deposes and says" but it is necessary to expressly state that Edward Smith is the attorney for John Brown. So where the residence of the deponent is a material fact or is required to be shown in the affidavit, the fact must be expressly stated and verified, it being insufficient to add the name of the place of residence as matter of description to the name of the deponent, as by commencing the affidavit with the words, "S., of the city of A., being duly sworn says,"[60] but where there is nothing in the statute expressly requiring the fact of residence to be stated, though the statute requires that the affidavit be made by a resident of a certain city, it is sufficient to state at the commencement of the affidavit "I, ———, of the city of ———, do solemnly swear," etc.[61]

—— **Interlineations and erasures.** Interlineations and erasures may be grounds for refusing to consider the affidavit.[62] If an alteration is made in an affidavit or there is an interlineation or erasure, it should be referred to at the end of the affidavit and the particular alteration, interlineation or erasure stated and identified by the initial of the officer or in some other manner clearly showing that it was in the affidavit at the time it was sworn to before the officer.

—— **Scandalous matter.** The affidavit must not contain scandalous or impertinent matter. If it does, it may be suppressed.[63]

—— **Sufficiency of copy served.** Where a law requires a copy of an affidavit to be served on the adverse party, the copy need not contain the name of the magistrate before whom the affidavit was sworn,[64] nor need the copy contain the signature of the affiant or purport that the original was signed by the affiant and authenticated by the officer, where the opposite

60 Staples v. Fairchild, 3 N. Y. (3 Comst.) 41; Payne v. Young, 8 N. Y. (4 Seld.) 158.

61 People ex rel. Morgenthau v. Cady, 105 N. Y. 299.

62 Henry v. Bow, 20 How. Pr. 215.

63 Opdyke v. Marble, 18 Abb. Pr. 375; People v. Church, 2 Lans. 459; People v. Albany & S. R. Co., 57 Barb. 204.

64 Livingston v. Cheetham, 2 Johns. 479.

party has had an opportunity of inspecting the original which is properly signed.[65]

§ 531. Who may make.

An affidavit should be made by the person who has knowledge of the facts.

If the affidavit relates to a fact peculiarly within the knowledge of a party, it must be made by the party, or an excuse given for the making by a third person,[66] though an agent who has charge of an action may sometimes make an affidavit without stating any excuse why the party did not make it,[67] but ordinarily when an affidavit is made by an agent there should be proof that he has knowledge, or at least satisfactory information as to the essential facts stated by him, and where he acts upon information only, the sources of his information should be stated and the reasons why the affidavit is not made by someone having knowledge of the fact.[68]

Oftentimes, in the course of a litigation, an affidavit will be required where the facts are within the knowledge of the attorney or of some one in his office, and are not known by the client. In such a case the attorney or person having knowledge should make the affidavit. On the other hand, an affidavit by an attorney as to what he has been informed by the party he represents will not be regarded by the court where the party himself can make affidavit.[69] However, it has been held that the fact that an affidavit made by an attorney does not state as a reason therefor that the party is absent, does not invalidate it, where the absence is stated on the motion and not denied by the adverse party.[70] It has been held that an affidavit by the attorney's clerk is insufficient as a foundation for a motion, if no excuse is offered for its not being made by the attorney.[71]

[65] Barker v. Cook, 16 Abb. Pr. 83, 25 How. Pr. 190, 40 Barb. 254.

[66] Jackson v. Stiles, 1 Cow. 134; Clark v. Frost, 3 Caines, 125.

[67] Murray v. Kirkpatrick, 1 Cow. 210.

[68] Butterworth v. Boutilier, 50 State Rep. 828; Cribben v. Schillinger, 30 Hun, 248.

[69] Pach v. Geoffroy, 47 State Rep. 247, 65 Hun, 619, 19 N. Y. Supp. 583.

[70] Deshay v. Persse, 9 Abb. Pr. 289, note.

[71] Jackson v. Woodworth, 3 Caines, 136; Chase v. Edwards, 2 Wend. 283.

An affidavit required to be made by a "printer" of a paper may be made by the "publisher."[72]

—— **Competency of deponent as witness.** The question as to whether a person incompetent to testify as a witness can make an affidavit which will be considered, and the effect thereof, is of considerable interest, but no positive rule has been laid down in regard thereto in this state. It has been held that where the testimony of the plaintiff would be incompetent, by reason of its relating to a transaction with a deceased person, the plaintiff's affidavit is not alone sufficient to support an injunction and the appointment of a receiver,[73] and that a person serving a sentence on a conviction for a felony, can not make an affidavit.[74] On the other hand, it is held that the fact that the deponent is an atheist is not ground for excluding his affidavit.[75]

At common law, the fact that a party, by reason of interest, was incompetent to testify, did not prevent him from making affidavits for certain purposes, and it can be safely said that the strict rules relating to the competency of a witness to testify in open court do not apply so as to prevent receiving an affidavit of a person incompetent to testify especially where the affidavit relates to incidental matters arising during the pendency of an action.

—— **One of several co-parties.** If an affidavit is required to be made by "the party," the question arises whether it may be made by one of the persons constituting "the party" or whether it must be made by them all. Some light is thrown on this question by noticing a case where an estimate made for a municipal contract was required by ordinance to be "verified by the oath in writing of the party making the estimate," and it was contended that an estimate made in behalf of a partnership, but verified only by the oath of one partner, was insufficient. It was held that the word "party" may mean either a single individual or a class or number of persons holding a certain interest or united in a certain relation, and that

72 Bunce v. Reed, 16 Barb. 347.
73 Gregory v. Gregory, 33 Super. Ct. (1 J. & S.) 1.
74 People ex rel. Lord v. Robertson, 26 How. Pr. 90.
75 Leonard v. Manard, 1 Super. Ct. (1 Hall) 200.

it is to be determined from the context of the statute whether, in a certain case, the word means an individual or a class, but that in the case at bar it was neeessary that the estimate be verified by the oath of each partner.[76]

§ 532. Who may take.

The Code provides that an oath or affidavit required or authorized by law, except an oath to a juror or a witness upon a trial, an oath of office and an oath required by law to be taken before a particular officer, may be taken before a judge, clerk, deputy clerk, or special deputy clerk of a court, and notary public, mayor, justice of the peace, surrogate, special county judge, special surrogate, county clerk, deputy county clerk, special deputy county clerk, or commissioner of deeds. within the district in which the officer is authorized to act, and when certified by the officer to have been taken before him may be used in any court or before any officer or other person.[77] This provision is not limited to affidavits in pending actions.[78] The Code further provides that where an officer, person, board, or committee, has been heretofore, or is hereafter authorized by law, to take or hear testimony, or to hear or receive an affidavit, or to take a deposition, in relation to a matter, concerning which he or it has a duty to perform, the officer or person, or a member of the board or committee, may administer an oath, for that purpose.[79] This latter provision does not, however, apply to proceedings in an action pending in court.[80] The power of a board to administer oaths may be implied from power to examine witnesses under oath.[81]

It has been held that where the statute is not silent, but directs the affidavit to be taken before some officer authorized to administer oaths, it must be taken before one having a general authority to do so.[82]

[76] People ex rel. Dinsmore v. Croton Aqueduct Board, 5 Abb. Pr. 316
[77] Code Civ. Proc. § 842.
[78] Mosher v. Heydrich, 1 Abb. Pr., N. S., 258, 30 How. Pr. 161.
[79] Code Civ. Proc. § 843.
[80] Berrien v. Westervelt, 12 Wend. 194.
[81] People ex rel. Beller v. Wright, 3 Hun, 306.
[82] Christman v. Floyd, 9 Wend. 340.

The officers before whom oaths and affidavits "may be taken" are bound to administer the same when requested.[83]

—— **Attorneys.** The rule not to allow an affidavit taken before the attorney in the action to be read, is an old rule of the King's Bench that has often been followed in this state,[84] but it is held that the rule extends only to the attorney of record,[85] and not to his partner,[86] nor to one who is merely counsel,[87] and that the rule does not apply to affidavits preparatory to suit,[88] such as affidavits to hold to bail,[89] nor to a verification of confession of judgment, in the absence of proof that the attorney was employed as such before administering the oath.[90]

At present, an attorney cannot take an affidavit or oath merely because he is an attorney, but he must also be one of the officers enumerated in the Code provision.

§ 533. Counter-affidavits.

If the opposing party desires to contest the allegations of an affidavit, where the application is on notice, he may usually file a counter affidavit. Such an affidavit should be couched in as positive terms as the original[91] since a denial upon information and belief, where the sources of information and grounds of belief are not given, can have no weight as against the positive affidavit of the moving party.[92] A fortiori, a denial in a counter affidavit that the affiant has any information or knowledge sufficient to form a belief as to essential facts stated in the moving affidavit, or an averment that he has no such knowledge, does not raise an issue as to those facts, but is an

83 People v. Brooks, 1 Denio, 457.

84 Kuh v. Barnett, 57 Super. Ct. (25 J. & S.) 234; Anonymous, 4 How. Pr. 290; Matter of Cross, 2 Ch. Sent. 3; Taylor v. Hatch, 12 Johns. 340; Murray v. Hefferan, 2 Month. Law Bul. 67.

85 People v. Spalding, 2 Paige, 326.

86 Hallenback v. Whitaker, 17 Johns. 2.

87 Willard v. Judd, 15 Johns. 531; People v. Spalding, 2 Paige, 326.

88 Vary v. Godfrey, 6 Cow. 587.

89 Adams v. Mills, 3 How. Pr. 219.

90 Post v. Coleman, 9 How. Pr. 64.

91 Matter of Sullivan, 55 Hun, 285; Simmons v. Craig, 43 State Rep. 358, 17 N. Y. Supp. 24.

92 Harris v. Taylor, 35 App. Div. 462.

absolute nullity.[93] If the counter affidavit is defective in a certain respect, the party cannot insist on the same defect in the original affidavit.[94]

—— **Impeaching credibility of deponent.** The practice is common to show the reputation of the deponent or deponents by affidavit in behalf of the opposing parties and of course where such practice is allowed other affidavits may be introduced by the moving party to support the reputation of the person attacked.[95] Where the veracity of the deponents to affidavits in support of a motion is impeached by affidavits read at the hearing of the motion, it has been held that the affidavits of such deponents will not be wholly rejected, nor will they be fully credited, but the affidavits upon both sides will be taken into consideration with other circumstances, by the court, in deciding upon the merits of the motion.[96]

§ 534. Amendment.

The provision of the old Code allowing amendment of "pleadings and proceedings" was held not to extend to affidavits,[97] but no reason is apparent as to why, under the present liberal statute relating to amendments, an affidavit may not be amended by obtaining leave to withdraw it and have the error corrected, and such is the common practice. If it is desired to add new allegations, the better practice would seem to require the obtaining of leave to withdraw the affidavit and substitute a new one therefor. Leave to amend the jurat has been granted on payment of costs, even after a determination of the motion.[98]

§ 535. Suppression and striking out part of affidavit.

The propriety of striking out part of an affidavit at any time

[93] Simmons v. Craig, 137 N. Y. 550 (lower court, 43 State Rep. 358); Matter of McLean, 62 Hun, 1; People ex rel. Carleton v. Board of Assessors, 52 How. Pr. 140.

[94] So held in regard to title. Atwater v. Williams, 2 How. Pr. 274.

[95] Merritt v. Baker, 11 How. Pr. 456. Contra,—Callen v. Kearny, 2 Cow. 529.

[96] Francis v. Church, Clarke, 333.

[97] Clickman v. Clickman, 1 N. Y. (1 Comst.) 611.

[98] Hees v. Snell, 8 How. Pr. 185.

is doubtful. Such does not appear to have been the usual practice even in courts of equity, and, before the Code, was never resorted to in courts of law. The decision of the chancellor in Powell v. Kane, 5 Paige, 265, seems, however, to sanction striking out parts of an affidavit as scandalous, on the court's own motion. The better practice is to suppress the affidavit, and if it has been filed, to take it from the file,[99] but a motion to suppress an affidavit as scandalous should not be made until the affidavit is sought to be used. The proper course is when the affidavit is offered to be read, to object to it as scandalous, and have it suppressed.[100]

§ 536. Use as evidence.

The Code provides that where an officer, person, board or committee, to whom or to which application is made to do an act in an official capacity requires information or proof, to enable him or it to decide upon the propriety of doing the act, he or it may receive an affidavit for that purpose.[101]

—— **Second use.** It appears to be the practice, in England, to read affidavits in one suit, that have been used in another, on certain applications and it is allowable in this state on an application for orders of publication, and of a like nature.[102] There is no positive rule that no affidavit can be twice used.[103]

ART. II. AFFIDAVITS TAKEN WITHOUT THE STATE.

§ 537. Code provision.

The Code provides that an oath or affidavit required, or which may be received, in an action, special proceeding, or other matter, may be taken, without the state, except where it is otherwise specially prescribed by law, "before an officer authorized by the laws of the state, to take and certify the acknowledgment and proof of deeds, to be recorded in the state; and, when certified by him to have been taken before him, and

99 Opdyke v. Marble, 18 Abb. Pr. 375.
100 Opdyke v. Marble, 18 Abb. Pr. 375.
101 Code Civ. Proc. § 843.
102 Barnard v. Heydrick, 49 Barb. 62.
103 Mojarrieta v. Saenz, 80 N. Y. 547.

accompanied with the like certificates, as to his official character and the genuineness of his signature, as are required to entitle a deed acknowledged before him to be recorded within the state, may be used, as if taken and certified, in this state, by an officer authorized by law to take and certify the same.[104] It is held that the clause in this provision that an affidavit may be taken before "an officer authorized by the laws of the state, to take and certify the acknowledgment and proof of deeds, to be recorded in the state," means an officer authorized to take such acknowledgment by the laws of New York state and not by the laws of the state in which the affidavit is made,[105] and that hence a notary public cannot take an affidavit outside of the state to be read in a court in this state.[106] It is contended with much force in a learned and elaborate note in 5 New York Annotated Cases, page 374 et seq., that these decisions are erroneous in view of clause 5 of Laws 1896, c. 547, § 249, which provides that acknowledgments may be taken in a sister state before "any officer of a state authorized by the laws thereof to take the acknowledgment or proof of deeds to be recorded therein." As stated in such note it has been inferentially held, however, that if a notary public of another state is authorized by the laws thereof to take acknowledgment of proof of deeds to be recorded in that state, and such fact is properly certified, an affidavit taken by such a person may be read in evidence in this state,[107] and a later case expressly holds that an affidavit sworn to in a foreign state before a notary public, certified by the clerk of a court of record as authorized to take it and "to take acknowledgments and proofs of deeds or conveyances of land," may be used on a motion before the courts of New York.[108]

§ 538. Real property law.

As the persons who may take and administer oaths and affi-

104 Code Civ. Proc. § 844.
105 Ross v. Wigg, 34 Hun, 192; Turtle v. Turtle, 31 App. Div. 49.
106 Turtle v. Turtle, 31 App. Div. 49.
107 Stanton v. United States Pipe Line Co., 90 Hun, 35.
108 Levy v. Levy, 29 Misc. 374. See, also, Matter of Wisner, 3 Dem. Surr. 11.

davits outside the state are the persons who may take acknowledgments of deeds outside the state, to be recorded in this state it will be necessary in this connection to consider sections 249 et seq. of chapter 547 of the Laws of 1896 (Real Property Law) which provide therefor.

Where the bracketed words "acknowledgment or proof of a conveyance of real property" occur in the following statutes they should be read as if the word "affidavit" was substituted therefor.

§ 539. Who may take acknowledgments—In sister states.

The [acknowledgment or proof of a conveyance of real property, within the state], may be made without the state, but within the United States, before either of the following officers acting within his jurisdiction, or of the court to which he belongs:

1. A judge of the supreme court, of the circuit court of appeals, of the circuit court, or of the district court of the United States.

2. A judge of the supreme, superior, or circuit court of a state.

3. A mayor of a city.

4. A commissioner appointed for the purpose by the governor of the state.

5. Any officer of a state, authorized by the laws thereof to take the acknowledgment or proof of deeds to be recorded therein.[109]

—— **Without the United States.** The [acknowledgment and proof of a conveyance of real property within the state], may be made without the United States before either of the following officers:

1. An ambassador, a minister plenipotentiary, minister extraordinary, minister resident, or charge d'affaires of the United States, residing and accredited within the country.

2. A consul-general, vice-consul-general, deputy-consul-general, vice-consul or deputy-consul, a consular or vice-consular

[109] L. 1896, c. 547, § 249.

agent, or a consul or commercial or vice-commercial agent of the United States residing within the country.

3. A commissioner appointed for the purpose by the governor, and acting within his own jurisdiction.

4. A person specially authorized for that purpose by a commission, under the seal of the supreme court, issued to a reputable person, residing in or going to the country where the acknowledgment or proof is so to be taken.

5. If within the Dominion of Canada, it may also be made before any judge of a court of record; or before any officer of such dominion authorized by the laws thereof to take the acknowledgment or proof of deeds to be recorded therein.

6. If within the United Kingdom of Great Britain and Ireland, or the dominions thereunto belonging, it may also be made before the mayor, provost or other chief magistrate of a city or town therein, or before a notary public.[110]

If the party or parties executing such [conveyance] shall be, or reside, in any state or kingdom in Europe, or in North or South America, the same may be [acknowledged or proved] before any ambassador, minister, plenipotentiary, or any minister extraordinary, or any charge d'affaires, of the United States, resident and accredited within such state or kingdom. If such parties be or reside in France, such [conveyance] may be [acknowledged or proved] before the consul of the United States, appointed to reside at Paris; and if such parties be or reside in Russia, such [conveyances] may be [acknowledged or proved] before the consul of the United States appointed to reside at Saint Petersburg.[111]

—— **In countries over which United States exercises a protectorate.** If the party or parties [executing such conveyance] shall be or reside in Porto Rico, the Philippine islands, Cuba, or in any other place over which the United States at the time has or exercises sovereignty, control, or a protectorate, the same may be [acknowledged or proved] before:

1. A judge of a court of record thereof, acting within his jurisdiction;

[110] L. 1896, c. 547, § 250, as amended L. 1899, c. 542, and L. 1901, c. 611.

[111] 1 Rev. St. 757, § 5, as amended L. 1895, c. 793.

2. A mayor or other chief officer of a city, acting in such city;

3. A commissioner appointed for the purpose by the governor of this state and acting within his jurisdiction;

4. An officer of the United States regular army or volunteer service of the rank of captain or higher, or an officer of the United States navy of the rank of lieutenant or higher, while on duty at the place where such party or parties are or reside.

The certificate [of an acknowledgment] taken before any of the officers mentioned in subdivision one, two or three of this section, shall have attached thereto the seal of the court or officer if he have a seal, and if such officer have no seal, then a statement to that effect. The certificate of [an acknowledgment] taken before an officer of the army or navy shall state his rank, the name of the city, or other political division where taken, and the fact that he is on duty there, and shall be authenticated by the secretary of war or the secretary of the navy, as the case may be, of the United States.[112]

§ 540. Jurat.

The affidavit is sufficient if certified by the officer taking it "to have been taken before him."[113] The statutes relating to acknowledgment of deeds do not apply to affidavits, in so far as to require the officer taking the affidavit to state in the jurat that he knows the affiant or has satisfactory evidence of his identity.[114] However, where a certificate is made by a commissioner appointed by the governor, or by the mayor or other chief magistrate of a city or town without the United States, or by a minister, charge d'affaires, consul-general, vice-consul-general, deputy-consul-general, vice-consul or deputy-consul, consular or vice-consular agent, or consul or commercial or vice-commercial agent, of the United States, it must be under his seal of office, or the seal of the consulate to which he is attached,[115] and where the proof is taken by a commissioner ap-

112 L. 1896, c. 547, § 249a, amended L. 1901, c. 84.
113 Code Civ. Proc. § 844.
114 Ross v. Wigg, 6 Civ. Proc. R. (Browne) 263.
115 L. 1896, c. 547, § 257.

pointed by the governor, for a city or county within the United States, and without the state, the certificate must state the day on which, and the town and county or the city in which it was taken.[116]

—— Form of jurat.

The above affidavit was sworn to before me, the undersigned, a [describe officer] residing at ———, in the state of ———, in said city, this ——— day of ———, 190—. In witness whereof I have hereunto set my hand and official seal, this ——— day of ———, 190—.
[Seal.] [Signature and title of officer.][117]

§ 541. Authentication of officer's certificate—Necessity.

The statutes provide for the authentication of the identity of the officer taking the affidavit where taken (1) by a commissioner appointed by the governor, or (2) a judge of a court of record in Canada, or (3) the officer of a state of the United States, or of the Dominion of Canada authorized by the laws thereof to take the acknowledgment or proof of deeds to be recorded therein.[118] In other cases, it seems that no authentication as to the identity of the officer is necessary.

—— **By whom.** Where the original certificate is made by the officer of a state of the United States or of the Dominion of Canada, authorized by the laws thereof to take the acknowledgment or proof of deeds to be recorded therein, it must be authenticated by the secretary of state of the state, or the clerk, register, recorder or prothonotary of the county in which the officer making the original certificate resided when the certificate was made, or by the clerk of any court of that county, having by law a seal.[119]

Where the original certificate is made by a commissioner appointed by the governor, it must be authenticated by the secretary of state.[120]

116 L. 1896, c. 547, § 256.

117 If the jurat is that of a Canadian judge, name the court of which the judge is a member and state that it is a court of record of a named province.

118 L. 1896, c. 547, § 260; Bowen v. Stilwell, 9 Civ. Proc. R. (Browne) 277.

119 L. 1896, c. 547, § 260.

120 L. 1896, c. 547, § 260.

Where the original certificate is made by a judge of a court of record in Canada, it must be authenticated by a clerk of the court.[121]

—— **Contents of certificate.** An officer authenticating a certificate must subjoin or attach to the original certificate a certificate under his hand, and if he has, pursuant to law, an official seal, under such seal. Except when the original certificate is made by a judge of a court of record in Canada, such certificate of authentication must specify that, at the time of taking the acknowledgment or proof, the officer taking it was duly authorized to take the same; that the authenticating officer is acquainted with the former's handwriting, or has compared the signature to the original certificate with that deposited in his office by such officer; and that he verily believes the signature to the original certificate is genuine; and if the original certificate is required to be under seal, he must also certify that he has compared the impression of the seal affixed thereto with the impression of the seal of the officer who took the acknowledgment or proof deposited in his office and that he verily believes the impression of the seal upon the original certificate is genuine.[122]

A clerk's certificate authenticating a certificate of proof taken before a judge of a court of record in Canada, must specify that there is such a court; that the judge before whom the acknowledgment of proof was taken was, when it was taken, a judge thereof; that such court has a seal; that the officer authenticating is clerk thereof; that he is well acquainted with the handwriting of such judge, and verily believes his signature is genuine.[123] The cases hold that the authentication of an affidavit taken in another state is sufficient if it substantially, though not literally, complies with the statute. For example, the authentication of an affidavit taken before a judge of another state has been held to substantially comply with the statute though it omitted to state that the affidavit was subscribed before the judge and it designated the place where the

121 L. 1896, c. 547, § 260.

122 L. 1896, c. 574, § 261; Hyatt v. Swivel, 52 Super. Ct. (20 J. & S.) 1; Matter of Wisner, 3 Dem. Surr. 11.

123 L. 1896, c. 574, § 261.

affidavit was taken only by the name of the county as stated in the venue, and the clerk's certificate did not expressly allege that there was a supreme court, nor state that he verily believed the signature was genuine.[124] So a certificate that the judge who took the affidavit was president judge of the court of common pleas of the eighth judicial district was held sufficient, though it did not appear that the judge was a judge of the common pleas of the "county" in which the affidavit was taken.[125] Likewise, stating that "the name of said Judge * * * subscribed to the above jurat is to me known to be the autograph signature of said Judge * * *," was held a substantial compliance with the statute.[126] And a defect in the certificate in describing the affidavit as an "acknowledgment" is to be disregarded since "not affecting the substantial rights of the adverse party."[127] But the certificate of a clerk of the sister state where the affidavit was made, that the notary who took the oath is authorized to administer an oath, is insufficient to show the authority of the notary under the laws of such sister state,[128] since the certificate must state that the officer is authorized by the laws of his state "to take the acknowledgment or proof of deeds to be recorded." For the same reason, a certificate stating that G. was an acting notary, and as such was duly authorized by the laws of Pennsylvania to take the affidavit, but failing to state that he was authorized by the laws of that state to take and certify the acknowledgment and proof of deeds to be recorded in that state, is not in substance and effect in compliance with the statutory requirements so as to entitle the affidavit to be used.[129] Substantial compliance with the statute is all that is required, but this means that the certifying officer must state enough in his certificate from which the legal inference of authority to administer the oath, and that it was in fact administered by the person who had the authority, will irresistibly flow.[130]

124 Belden v. Devoe, 12 Wend. 223.
125 Manufacturers' & Mechanics' Bank v. Cowden, 3 Hill, 461.
126 Ross v. Wigg, 34 Hun, 192.
127 Spencer v. Fort Orange Paper Co., 74 App. Div. 74.
128 Turtle v. Turtle, 31 App. Div. 49; Manheimer v. Dosh, 36 Misc. 857.
129 Stanton v. United States Pipe Line Co., 90 Hun, 35.
130 Bowen v. Stilwell, 9 Civ. Proc. R. (Browne) 277.

A "material" defect in the authentication cannot be cured by amendment or an order nunc pro tunc.[131]

—— Form of certificate.

State of ———, County of ———, ss.:

I, ———,[132] do hereby certify that ——— who subscribed the annexed affidavit was at the time of taking the same[133] ——— residing in said county, and duly authorized by the laws of said State, to take and certify the same, as well as to take and certify the proof and acknowledgment of deeds to be recorded therein, and that the same is taken and certified in all respects, as required by the laws of said State; and I further certify that I am well acquainted with the handwriting of the said ——— and verily believe that the signature attached to the annexed certificate is his genuine signature; and I further certify that I have compared the impression of the seal attached to said certificate with the impression of the seal of the said ——— deposited in my office and I verily believe the impression of the seal on said certificate is genuine.

In witness whereof, I have hereunto set my hand and official seal this ——— day of ———, 190—.

[Seal.]

[If the affidavit has been taken before a judge in Canada, the certificate should be in the form already stated.][134]

§ 542. Affidavit improperly authenticated as evidence.

An affidavit not properly authenticated, though not competent as an affidavit in the courts of this state, may be considered by the court when referred to in a proper affidavit as the source of the affiant's information.[135]

131 Harris v. Durkee, 5 Civ. Proc. R. (Browne) 376; Matter of Hotchkiss, 17 Misc. 670. Contra,—Lawton v. Kiel, 51 Barb. 30, 34 How. Pr. 465.

132 Here insert the name of the officer making the certificate and his official title, e. g., "C. D., Clerk of the County of H., in the State of N.," or, "C. D., Clerk of the Court of Common Pleas, in and for the County of N., in the State of N., the same being a court having a seal."

133 Here insert a description of the officer concerning whom the certificate is made, e. g., "a notary public in and for the county of M."

134 See ante, p. 556.

135 Hawkins v. Pakas, 39 App. Div. 506.

§ 543. Time for objections.

The objection that an affidavit verified without the state, and read upon a motion, is not properly certified, must be taken to its reading, or it will be waived.[136]

ART. III. AFFIDAVIT OF MERITS.

§ 544. Definition.

An affidavit of merits, sometimes called an affidavit of defense, is a statement that the defendant has a good ground of defense to the plaintiff's action upon the merits.[137]

§ 545. Necessity.

In order to prevent plaintiff from taking an inquest in an action out of its regular order on the calendar, a defendant who has served an unverified answer, must prepare and file with the clerk an affidavit of merits and must serve a copy thereof on the plaintiff's attorney before or on the first day of the trial term.[138] But if an answer is verified, no affidavit of merits is required to prevent an inquest,[139] nor is an affidavit of merits necessary for such purpose in actions in equity, triable by the court.[140] So an affidavit of merits is required where an order extending the defendant's time to answer or demur is sought,[141] and on a motion to make the complaint more definite,[142] and on a motion by a defendant to open a default,[143] and, in certain cases, on a motion to change the place of trial.[144] And it is safe to add an affidavit of merits where a favor is asked of the court, or its discretion appealed to.

[136] Mix v. Andes Ins. Co., 74 N. Y. 53; Plympton v. Bigelow, 11 Abb. N. C. 180.

[137] Cyc. Law Dict. p. 36.

[138] Rule 28 of General Rules of Practice; Smith v. Aylesworth, 24 How. Pr. 33.

[139] Code Civ. Proc. § 980.

[140] Devlin v. Shannon, 8 Hun, 531.

[141] Rule 24 of General Rules of Practice.

[142] Bingham v. Bingham, 1 Civ. Proc. R. (McCarty) 166.

[143] Popkin v. Friedlander, 23 Misc. 475; Gold v. Hutchinson, 26 Misc. 1; Davis v. Solomon, 25 Misc. 695.

[144] Post, volume II.

—— Second use. The old rule that an affidavit of merits made and used for one purpose could not be used for another,[145] has been changed by a rule of practice which provides that when an affidavit of merits has once been filed and served, no other shall be necessary, but on making a motion where an affidavit of merits has once been filed and served, such service and filing must be shown by the affidavit, as an excuse for failure to swear to the merits.[146] Even under the old practice, it was held that an affidavit of merits offered on a motion would not be excluded because of the same date as a copy served to prevent an inquest, on the ground that the court would not presume, without proof, that it was an attempt to use the same affidavit twice.[147]

§ 546. Who may make.

As an affidavit of merits is always in aid of a motion by a defendant, it is usually made by him, but it may be made by his attorney,[148] though ordinarily when made by an agent or attorney, an excuse must be stated,[149] such as that defendant is absent.[150] The real party in interest may make an affidavit, though not a party to the record, where he shows excuse for its not being made by the party to the record, and his knowledge of the case.[151]

§ 547. Contents.

Whenever it shall be necessary, in any affidavit, to swear to the advice of counsel, the party shall, in addition to what has usually been inserted, swear that he has fully and fairly stated the case to his counsel, and shall give the name and place of

145 Belden v. Devoe, 12 Wend. 223; Cutler v. Biggs, 2 Hill, 409; Robinson v. Sinclair, 1 How. Pr. 106; Popham v. Baker, 1 How. Pr. 166; Colegate v. Marsh, 2 How. Pr. 137.

146 Rule 23 of General Rules of Practice.

147 Mygatt v. Garrison, 18 Abb. Pr. 292, note.

148 Banks v. Walker, 1 Barb. Ch. 74.

149 Roosevelt v. Dale, 2 Cow. 581; Mason v. Bidleman, 1 How. Pr. 62; Davis v. Solomon, 25 Misc. 695.

150 Geib v. Icard, 11 Johns. 82.

151 Miller v. Hooker, 2 How. Pr. 124.

residence of such counsel.[152] The affidavit must state that the counsel is the counsel of the defendant in the action in which the affidavit is made.[153] A statement that the party has fully and fairly stated to counsel either "his case" or "this case," is sufficient,[154] but a statement that he has stated "the facts of" the case, instead of "the case"[155] or "his defense,"[156] or "the facts of his defense,"[157] or "his case in this cause,"[158] has been held insufficient. The defense must be stated to be to the plaintiff's cause of action, and not to "the plaintiff's declaration filed in this suit,"[159] or to "the promissory note on which this action is brought,"[160] or "plaintiff's demand on the promissory note on which this action is brought,"[161]

An affidavit of a defense without stating advice of counsel thereon is insufficient,[162] as is a statement that defendant has a good defense without adding "on the merits,"[163] and defendant must swear to a "good," not a "full," defense.[164] So a statement of the facts "as far as the facts have come to his knowledge, and he believes them to exist," is insufficient,[165] as is a

[152] Rule 23 of General Rules of Practice; Sidney B. Bowman Cycle Co. v. Dyer, 23 Misc. 620; Onondaga County Bank v. Shepherd, 19 Wend. 10; Bleecker v. Storms, 2 How. Pr. 161; Cary v. Livermore, 2 How. Pr. 170.

[153] State Bank of Syracuse v. Gill, 23 Hun, 406.

[154] Brownell v. Marsh, 22 Wend. 636; Brown v. Masten, 2 How. Pr. 195; Jordan v. Garrison, 6 How. Pr. 6.

[155] Fitzhugh v. Truax, 1 Hill, 644.

[156] Brownell v. Marsh, 22 Wend. 636; Richmond v. Cowles, 2 Hill, 359; Ellis v. Jones, 6 How. Pr. 296; Tompkins v. Acer, 10 How. Pr. 309.

[157] Rickards v. Swetzer, 3 How. Pr. 413, 1 Code R. 117.

[158] Ellis v. Jones, 6 How. Pr. 296.

[159] Howe v. Hasbrouck, 1 How. Pr. 68.

[160] Durant v. Cook, 1 How. Pr. 45.

[161] Mason v. Moore, 2 How. Pr. 70.

[162] Bruen v. Adams, 3 Caines, 97, Col. & C. Cas. 448; Cannon v. Titus, 5 Johns. 355; Swartwout v. Hoage, 16 Johns. 3; Duche v. Voisin, 18 Abb. N. C. 358; McMurray v. Gifford, 5 How. Pr. 14.

[163] Meech v. Calkins, 4 Hill, 534; Tompkins v. Acer, 10 How. Pr. 309; State Bank of Syracuse v. Gill, 23 Hun, 406.

Contra,—Briggs v. Briggs, 3 Johns. 449.

[164] Bank of Utica v. Root, 4 Hill, 535.

[165] Brown v. St. John, 19 Wend. 617.

statement of defense to "the whole or some part of" the cause of action.[166]

A statement that deponent is advised by said counsel that said defendants have a good and substantial defense to said suit on the merits, "which advice deponent believes to be true," is insufficient,[167] as is one that he "believed," instead of "believes" the advice of counsel to be true.[168] It is insufficient to state "that as deponent is advised by his counsel * * * the said defendant had a good and sufficient defense, upon the merits, to said action,"[169] and an allegation that the note in suit had been paid, without stating when, where, or how, is insufficient as ground of a motion to open a judgment.[170]

—— **Where made by attorney.** An attorney making an affidavit must show the source of his knowledge[171] but need not swear to advice of counsel.[172]

Form of affidavit.

[Title and venue.]

———, the defendant in the above entitled action, being duly sworn, doth depose and say, that ——— ha fully and fairly stated the case in the above action to ——— counsel in this action, who resides ——— in the said ——— and that ——— ha a good and substantial defense upon the merits thereof as ——— advised by ———. said counsel, after such statement, made as aforesaid, and verily believes to be true

[Jurat.] [Signature.]

§ 548. Affidavit as enuring to benefit of co-party.

An affidavit of merits by one of several parties to a note sued jointly, is available to all,[173] but the rule is otherwise when they are sued separately.[174]

166 Chemung Canal Bank v. Board Sup'rs of Chemung County, 1 How. Pr. 162.

167 Brittan v. Peabody, 4 Hill, 61.

168 Wharton v. Barry, 1 How. Pr. 62.

169 Gold v. Hutchinson, 26 Misc. 1.

170 Hunter v. Lester, 10 Abb. Pr. 260, 18 How. Pr. 347.

171 Briggs v. Briggs, 3 Johns. 258; Philips v. Blagge, 3 Johns. 141.

172 Cromwell v. Van Rensselaer, 3 Cow. 346.

173 Clark v. Parker, 19 Wend. 125.

174 Ontario Bank v. Baxter, 6 Cow. 395.

§ 549. Counter-affidavits.

The affidavit of merits cannot be controverted by opposing affidavits,[175] at least in so far as the allegations as to the merits are concerned.[176]

ART. IV. OATHS.

§ 550. Manner of administering oaths.

When an oath is administered, the witness is required to lay his hand on the gospels and express assent to the oath, but he need not kiss the gospels,[177] though if the party taking an oath makes no objection at the time that an oath is administered by mistake on a book other than the gospels, it is valid.[178] A Jew is usually sworn upon a Hebrew Bible and with his head covered.[179]

There are; however, certain exceptions to the general rule as stated, as follows:

Rule 1. The oath must be administered in the following form, to a person who so desires, the laying of the hand upon the gospels being omitted: "You do swear, in the presence of the ever-living God." While so swearing, he may or may not hold up his hand, at his option.[180]

Rule 2. A person believing in a religion, other than the Christian, may be sworn according to the peculiar ceremonies, if any, of his religion.[181]

Rule 3. A solemn declaration or affirmation, in the following form, must be administered to a person who declares that he has conscientious scruples against taking an oath, or swearing in any form: "You do solemnly, sincerely, and truly, declare and affirm."[182]

[175] Hanford v. McNair, 2 Wend. 286; Gideon v. Dwyer, 17 Misc. 233, 75 State Rep. 1485, 40 N. Y. Supp. 1053.

[176] Johnson v. Lynch, 15 How. Pr. 199.

[177] Code Civ. Proc. § 845, as amended L. 1899, c. 340.

[178] So held where the oath was administered on Watts' Psalm and Hymns. People v. Cook, 8 N. Y. (4 Seld.) 67.

[179] People v. Jackson, 3 Park. Cr. R. 590.

[180] Code Civ. Proc. § 846, as amended L. 1899, c. 340.

[181] Code Civ. Proc. § 849.

[182] Code Civ. Proc. § 847.

Rule 4. If the court or officer, before which or whom a person is offered as a witness, is satisfied, that any peculiar mode of swearing, in lieu of, or in addition to laying the hand upon the gospels, is, in his opinion, more solemn and obligatory, the court or officer may, in its or his discretion, adopt that mode of swearing the witness.[183] The court or officer may examine an infant or a person apparently of weak intellect, produced before it or him as a witness, to ascertain his capacity and the extent of his knowledge; and may inquire of a person, produced as a witness, what peculiar ceremonies in swearing he deems most obligatory.[184] A person swearing, affirming, or declaring, in any form, where an oath is authorized by law, is lawfully sworn, and is guilty of perjury, in a case where he would be guilty of the same crime, if he had sworn by laying his hand upon the gospels.[185]

Form of oath of referee.

[Title and venue.]

I, ———, the Referee, appointed by an order of this Court, made and entered in the above entitled action, and bearing date the ——— day of ———, 19—, to ———, do solemnly swear that I will faithfully and fairly determine the questions so referred to me and make a just and true report thereon, according to the best of my understanding.

Sworn to before me, this ——— day of ———, 19—.

183 Code Civ. Proc. § 848, as amended L. 1899, c. 340.

184 Code Civ. Proc. § 850.

185 Code Civ. Proc. § 851, as amended L. 1899, c. 340.

CHAPTER II.

MOTIONS.

ART. I. DEFINITION, NATURE AND KINDS, §§ 551-556.

ART. II. MOTION PAPERS, §§ 557-572.

(A) GENERAL RULES, §§ 557-563.

(B) COMPELLING MAKING OF AFFIDAVIT OR DEPOSITION FOR PURPOSE OF MOTION, §§ 564-572.

ART. I. DEFINITION, NATURE AND KINDS.

§ 551. Definition.

A motion is defined by the Code as an application for an order.[1] It may be oral or written. If made before trial, it is in writing. If made during the trial when the parties are present it is usually oral as where a motion is made to direct a verdict.

§ 552. When allowable.

Questions of regularity and practice should ordinarily be raised by motion,[2] but in cases of moment and difficulty, the court may, in its discretion, require that the matters in controversy be determined by action,[3] as where material questions of fact arise and the evidence is conflicting.[4] So substantial matter of defense should not be summarily disposed of by denying a motion to be relieved from an irregularity.[5] Likewise, an agreement between the parties to an action made after judgment in respect to the subject of it, cannot be enforced by a mere motion, especially where by reason of the agreement, and in reliance on it, one party has gained an advantage or the other has lost a benefit.[6]

A motion cannot be heard which does not ask the court to do anything, but only to express an opinion as counsel,[7] nor should a motion be entertained before the cause is at issue, the decision of which cannot effect any practical result beyond that.[8]

—— **Motion or appeal.** Whether the remedy is to appeal or

[1] Code Civ. Proc. § 768.

[2] Derham v. Lee, 47 Super. Ct. (15 J. & S.) 174.

[3] McLean v. Tompkins, 18 Abb. Pr. 24.

[4] Hill v. Hermans, 59 N. Y. 396; Mutual Life Ins. Co. v. Belknap, 19 Abb. N. C. 345.

[5] McGuin v. Cace, 9 Abb. Pr. 160.

[6] Phillips v. Wicks, 38 Super. Ct. (6 J. & S.) 74.

[7] McMichael v. Kilmer, 20 Hun, 176.

[8] Hence, a motion will not be granted before trial for an order determining the extent of the relief grantable at the trial. Redmond v. Dana, 16 Super. Ct. (3 Bosw.) 615.

to make a motion depends largely on whether the objection relates to the merits or to technical defects. If the objection relates to technical defects or errors in form an appeal is not generally allowable, but the procedure is to first move and then if the motion is denied, to appeal from such denial.[9] Remedies by motion and appeal are often alternative.

—— **Difference between motion and petition.** A motion consists of a notice of motion containing, inter alia, a statement of the prayer for relief and an affidavit setting forth the facts but not praying for any relief. A petition is nothing except a certain kind of an affidavit. An application based on a petition alone is, however, not authorized except where a proceeding is commenced by a petition ex parte, in which case the order granted on it brings a party into court the same as a notice of motion would.[10] Formerly it was oftentimes fatal to make a mistake and use a petition instead of a motion or vice versa. A petition was used in chancery practice when the nature of the application required a fuller statement than could be conveniently made in a notice of motion.[11]

§ 553. Kinds of motions.

Motions are also classified as ex parte motions and motions on notice. Ex parte motions are motions heard on the application of one party only, without notice to the other party or parties. Motions made on notice are also called contested or litigated motions.

—— **Enumerated and non-enumerated motions.** The division of motions into enumerated and non-enumerated motions is arbitrary and governed solely by the Code. Under the General Rules of Practice, enumerated motions are motions arising on special verdict, issues of law, cases, exceptions, appeals from judgments sustaining or overruling demurrers, appeals

[9] Post, § 624. See cases in 11 Abb. Cyc. Dig. 1000 et seq.

[10] See Matter of Livingston, 34 N. Y. 555.

[11] For a statement of the former rules, see 1 Abb. New Practice & Forms, 332 et seq.

from judgment or order granting or refusing a new trial in an inferior court, appeals by virtue of sections 1346 and 1349 of the Code, agreed cases submitted under section 1279 of the Code, and appeals from final orders and decrees of surrogates' courts and matters provided for by sections 2085 to 2099 of the Code, which relate to mandamus proceedings and to the writ of prohibition and by section 2138 which relates to the hearing on a return to a writ of certiorari to review the determination of an inferior tribunal.[12] Non-enumerated motions include all other questions submitted to the court.[13] The differences between enumerated and non-enumerated motions relate to the place and time of hearing, etc., which will be noticed further on in this chapter.

§ 554. Who may move.

A party of record not in contempt of court may make a motion, but a party who has an attorney of record cannot, without his concurrence, make a motion by counsel,[14] and a plaintiff allowed to be made a party after the commencement of the action, cannot make motions by his own attorney which are not joined in by any other of the plaintiffs.[15] So it seems that a person made a party but not served, may, in certain cases, make a motion relating to the proceedings,[16] as may any person, though not a party on the record, where interested, to enable him to obtain the relief to which he would be entitled if he was a party.[17]

[12] Rule 38 of General Rules of Practice; Reynolds v. Freeman, 6 Super. Ct. (4 Sandf.) 702; Chandler v. Trayard, 2 Caines, 94.

[13] Rule 38 of General Rules of Practice.

A motion to set aside a referee's report for irregularity is a non-enumerated motion. Remsen v. Isaacs, 1 Caines, 22; Clinton v. Elmendorf, 3 Johns. 143.

So is a motion for judgment on the pleadings, on the ground that the answer raises no issues. People v. Northern R. Co., 42 N. Y. 217.

[14] Kiernan v. Campbell, 1 Month. Law Bul. 18.

[15] Manning v. Mercantile Trust Co., 26 Misc. 440.

[16] Lyle v. Smith, 13 How. Pr. 104.

[17] Dwight's Case, 15 Abb. Pr. 259.

The judge himself oftentimes makes an order on his own motion during the course of a trial, but it has been held that a judge of the court has no authority, any more than has any third person, of his own motion, without having the parties before him in pursuance of some formal legal process or proceeding, or unless, being present, they consent that the subject may be then judicially considered, to make an order in a pending suit or proceeding.[18]

§ 555. Who may be moved against.

A motion may not only be made against a party but against a third person who has submitted himself to the authority of the court, where he appears and opposes the motion, and it has been held that the order is binding on such a person,[19] though the contrary appears to have also been held.[20]

§ 556. Withdrawal of motion.

If the party making an oral motion in the course of a trial, desires to withdraw it, he need not obtain permission of the court, if the court has not yet acted on it, and nothing has intervened to create an estoppel,[21] but after a written motion on notice has been submitted to the court for its determination, it would seem that it cannot be withdrawn without payment of costs or without the consent of the court.[22]

ART. II. MOTION PAPERS.

(A) GENERAL RULES.

§ 557. What are.

Motion papers include the notice of motion or order to show cause, affidavits, counter-affidavits, papers referred to in affidavits, papers served in the cause, etc. For example, a copy

[18] Simmons v. Simmons, 32 Hun, 551.
[19] Jay v. De Groot, 2 Hun, 205.
[20] Acker v. Ledyard, 8 Barb. 514.
[21] Yale v. Dart, 26 Abb. N. C. 469, 36 State Rep. 40.
[22] Hoover v. Rochester Printing Co., 2 App. Div. 11.
Withdrawal of notice of motion, see post, § 580.

of a paper served in the cause is admissible as the foundation of a motion without an affidavit that it is a true copy.[23] So a copy of an instrument annexed to the affidavit and referred to therein as a copy, is evidence.[24]

§ 558. Entitling.

We have already considered the manner of entitling affidavits in general and it will not be necessary to repeat such statements.[25] It has been held that if one defendant moves in a cause where there are other defendants, his papers must be entitled with his own name as impleaded with the others,[26] but that where a motion is made for all the defendants, the papers may be entitled in the name of all of them.[27] The fact that a motion addressed to the special term should have been addressed to a judge of the court, does not require a refusal of the motion, since the words "at the next special term," etc., after the name of the judge, may be rejected as surplusage.[28]

§ 559. Address.

Original motion papers should be addressed to all the attorneys opposed.[29]

§ 560. Contents.

The motion papers must apprise the opposing party of the grounds on which the moving party relies, where the opposing party would have a right to explain by affidavit the matters which constitute the foundation of the motion,[30] but need not where the opposing party has no right to explain the answer by

23 Ripley v. Burgess, 2 Hill, 360.
24 Thompson v. Hewitt, 6 Hill, 254.
25 Ante, § 526.
26 Felt v. Hyde, 1 How. Pr. 64; Foote v. Emmons, 2 How. Pr. 89.
27 Rowell v. Crofoot, 3 How. Pr. 15.
28 People v. Sessions, 10 Abb. N. C. 192.
29 Anderson v. Vandenburgh, 1 How. Pr. 212.
30 Brower v. Brooks, 1 Barb. 423.

For collection of cases relating to necessity that motion state grounds in order to save question for review in appellate court, see 11 Abb. Cyc. Dig. 1002-1004.

affidavit or to amend or perfect his proceedings on terms,[31] or where it is evident from the demand for relief that the motion is based on a certain ground and that no other ground could be made the basis of such a prayer for relief.[32] Generally a motion may be denied because no certain ground is stated in the notice of motion or in the affidavit.[33] Objections on the ground of irregularities are not available on the motion if not taken in the moving papers,[34] and this rule applies equally whether the motion is made before or after judgment.[35] The irregularities complained of in a proceeding must all be embodied in one motion, it not being allowable to split up the motion and obtain relief by separate motions.[36] Supplemental affidavits are allowable, but they must be served the same length of time before motion day as is necessary for the service of copies of the principal affidavits.[37]

—— **Showing that motion is made in proper county.** The motion papers in the supreme court need not show that the motion is made in the proper county, but such fact should be set up as a defense,[38] but where the motion is before a judge at chambers, he may refuse to grant the order on such ground.

—— **Technical defects.** A motion to set aside proceedings on mere technical grounds should be denied where the moving papers are obnoxious to the same objections.[39, 40]

—— **Prefixing statement of facts of case.** On enumerated motions each party is required to prefix to his points a concise statement of the facts of the case, with reference to the folios, and if such statement is not furnished, no discussion of the facts by the party omitting such statement will be permitted.[41]

[31] Hanna v. Curtis, 1 Barb. Ch. 263.
[32] Bowman v. Sheldon, 7 Super. Ct. (5 Sandf.) 657. Per Duer, J.
[33] Ellis v. Jones, 6 How. Pr. 296.
[34] Roche v. Ward, 7 How. Pr. 416; Harder v. Harder, 26 Barb. 409.
[35] City of New York v. Lyons, 1 Daly, 296, 24 How. Pr. 280.
[36] Desmond v. Wolf, 1 Code R. 49; Mills v. Thursby, 11 How. Pr. 114.
[37] Wilcox v. Howland, 6 Cow. 576.
[38] Newcomb v. Reed, 14 How. Pr. 100.
[39, 40] Sawyer v. Schoonmaker, 8 How. Pr. 198.
[41] Rule 40 of General Rules of Practice.

—— **Statement as to previous application.** An "ex parte" application on affidavit to a judge or court for an order must state whether any previous application has been made for such order and, if made, to what court or judge, and what order or decision was made thereon, and what new facts, if any, are claimed to be shown,[42] but the failure to state that no previous application has been made is not an irregularity which compels the court to refuse to grant the order or to vacate it after it has been granted,[43] as the omission may be cured, in the discretion of the court, by amendment to defeat a motion to vacate the order on that ground.[44] Thus an affidavit which states that no previous application has been made for the order, except that an order had been previously obtained which was by stipulation between the parties declared lapsed and abandoned without prejudice to a renewal of the application, is sufficient to confer jurisdiction, notwithstanding the fact that there had been still another order which had been set aside on motion.[45]

The objection on such ground must be raised at the first opportunity, it being held fatal to delay until much labor and expense has been incurred and the chance of a favorable result has existed.[46]

It has been held that the rule refers to applications in a pending action and does not apply to those by which a special proceeding is commenced.[47]

§ 561. Counter-affidavits.

Counter-affidavits are admissible to oppose an original motion,[48] and may be read as to the sufficiency of an excuse for not moving at the earliest opportunity.[49] The general rules applicable to affidavits apply to counter-affidavits, except that

[42] Rule 25 of General Rules of Practice.

[43] Wooster v. Bateman, 4 Misc. 431; Bean v. Tonnelle, 24 Hun, 353.

[44] Ross v. Wigg, 6 Civ. Proc. R. (Browne) 268, note; Kroszinski v. Wolkoweiz, 1 Month. Law Bul. 90; Spring v. Gourlay, Id. 49.

[45] Ludlow v. Mead, 21 State Rep. 435, 3 N. Y. Supp. 321.

[46] Matter of Rogers, 9 Abb. N. C. 141.

[47] Matter of Rogers, 9 Abb. N. C. 141.

[48] Hart v. Faulkener, 5 Johns. 362.

[49] Quin v. Riley, 3 Johns. 249.

counter-affidavits need not be served on the moving party, either in case of enumerated or non-enumerated motions.[50] Where an affidavit on a motion asserts a fact positively, it can only be controverted by an equally positive denial or by stating facts, upon the affiant's knowledge, tending to disprove the facts asserted.[51]

Where the opponent of a motion admits the material facts stated in the moving papers, but relies upon new matter in avoidance, the moving party may put in affidavits in denial of such matter, but cannot himself set up new matter.[52] But if the moving party is permitted to put in a reply affidavit, the opposing party should not be denied leave to answer it.[53]

§ 562. Service.

On enumerated motions the party whose duty it is to furnish the papers, must serve a copy on the opposite party, except upon the trial of issues of law, at least five days before the time for which the matter may be noticed for argument.[54] If the party whose duty it is to furnish the papers neglect to do so, the opposite party shall be entitled to move, on affidavit and on four days' notice of motion that the cause be struck from the calendar (whichever party may have noticed it for argument), and that judgment be rendered in his favor.[55] Except where the question arises on a special verdict or on a demurrer, the party making the motion must furnish the papers.[56] The papers shall be furnished by the plaintiff when the question arises on special verdict,[57] and the papers should be furnished by the party demurring on the trial of issues of law.[58] It is not a sufficient answer to say that the party moved against should have asked that the papers be

[50] Strong v. Platner, 5 Cow. 21.
[51] Matter of Sullivan, 55 Hun, 285; Simmons v. Craig, 43 State Rep. 358, 17 N. Y. Supp. 24.
[52] Shearman v. Hart, 14 Abb. Pr. 358.
[53] Poillon v. Poillon, 75 App. Div. 536.
[54] Rule 40 of General Rules of Practice.
[55] Rule 40 of General Rules of Practice.
[56] Rule 40 of General Rules of Practice.
[57] Rule 40 of General Rules of Practice.
[58] Rule 40 of General Rules of Practice.

served on it, but rather that the moving party should have asked for leave to serve them on such terms as to the court might seem fit.[59]

Where a motion is based on an affidavit, a copy of the affidavit must be served on the opposite party, and an affidavit which has not been so served cannot be used in support of the motion,[60] even though the facts in it were not known until the day of bringing on the motion, since in such case, the party should have served copies and moved on the next day.[61] Supplemental affidavits cannot be received, unless copies have been served the same length of time before the day of moving as though the motion were founded on them.[62] A motion against a party to the suit may be heard on a notice that it will be founded on copies of papers already served on him,[63] but on a motion against one not a party, the papers to be used must be served with the notice.[64]

§ 563. Filing.

All the papers used or read on a motion on either side should be thereafter filed with the clerk, unless already on file or unless otherwise ordered by the court.[65] The old Code did not expressly require affidavits to be filed, and it was held thereunder that an order should not be set aside because of failure to file, where it appeared that a sufficient affidavit was used on the hearing of the motion.[66] The petition or affidavit upon which a writ has been granted must be filed by the attorney within ten days after the service thereof under a penalty of having the writ vacated by the court or judge granting the same, unless for proper cause shown time to file is extended.[67]

59 Smith v. Seattle, L. S. & E. Ry. Co., 47 State Rep. 283.
60 Frost v. Flint, 2 How. Pr. 74; Bennett v. Pratt, 2 How. Pr. 77; Brown v. Ricketts, 2 Johns. Ch. 425.
61 Clark v. Frost, 3 Caines, 125.
62 Wilcox v. Howland, 6 Cow. 576.
63 Newbury v. Newbury, 6 How. Pr. 182.
64 Morley v. Green, 11 Paige, 240.
65 Rule 3 of General Rules of Practice.
66 Vernam v. Holbrook, 5 How. Pr. 3.
67 Rule 4 of General Rules of Practice.

(B) COMPELLING MAKING OF AFFIDAVIT OR DEPOSITION FOR PURPOSE OF MOTION.

§ 564. Code provisions.

Until the time of the Revised Statutes, there was no power to compel the making of an affidavit or deposition for the purposes of a motion.[68] The Revised Statutes provided that when a motion or other proceeding was pending in the supreme court, in which it was necessary to have the deposition of any witness who refused voluntarily to make his deposition, a commission might be issued.[69] This was followed by subdivision 7 of section 401 of the old Code and by section 885 of the present Code which provides that where a party intends to make or oppose a motion in a court of record other than the city courts of Hudson, Utica, Oswego and Albany, and it is necessary for him to have the affidavit or deposition of a person not a party, to use upon the motion, the court or a judge authorized to make an order in the case may, in its or his discretion, make an order appointing a referee to take the deposition of that person.[70] This provision does not, however, authorize the taking of a deposition in a special proceeding.[71] Furthermore, a "fishing" examination is not allowable.[72]

§ 565. Discretion of court.

The granting of the order is in the discretion of the court or judge.[73]

§ 566. Refusal of witness to make affidavit as condition precedent.

The order will not be granted after the witness has made a voluntary affidavit.[74] It is necessary that the witness first re-

[68] Bacon v. Magee, 7 Cow. 515.
[69] 2 Rev. St. 554, pars. 24, 25.
[70] Code Civ. Proc. § 885.
[71] People ex rel. Harriman v. Paton, 5 State Rep. 316, 20 Abb. N. C. 172.
[72] Fisk v. Chicago, R. I. & P. R. Co., 3 Abb. Pr., N. S., 430.
[73] Code Civ. Proc. § 885.
[74] Ryers v. Hedges, 1 Hill, 646.

fuse to voluntarily make an affidavit. It has been held under the old Code that the applicant, before moving, should draw and present to the witness an affidavit, with a request that he sign and swear to it, unless the witness refuses to make any affidavit whatever,[75] but that the failure to submit such an affidavit was waived where the witness did not require a draft to be submitted but merely refused generally to testify.[76] It would seem that this is the proper practice under the present Code.

§ 567. Who may be examined.

The affidavit or deposition of a "party" can not be taken for such a purpose,[77] and it is held that a relator in mandamus is a party within the rule.[78]

§ 568. The application.

Application must be made to the court in which the proceedings are pending or to a judge authorized to make an order in the case, on affidavit.

—— **Who may apply.** The person applying for the order must be a party to the action; and it is held that a policy holder in an insurance company is not a party merely because the insurance company is a party, and hence he cannot make such a motion.[79]

—— **Notice.** If the defendant has appeared in the action and the application is made on the part of the plaintiff at least one day's notice of such application must be given to the attorney of the defendant, and if the application is made on the part of the defendant similar notice must be given to the attorney of the plaintiff.[80]

[75] Erie Ry. Co. v. Gould, 14 Abb. Pr., N. S., 279; Rogers v. Durant, 2 Thomp. & C. 676.

[76] Fisk v. Chicago, R. I. & P. R. Co., 3 Abb. Pr., N. S., 430.

[77] Code Civ. Proc. § 885.

[78] People ex rel. Harriman v. Paton, 20 Abb. N. C. 172, 5 State Rep. 316.

[79] Attorney-General v. Continental Life Ins. Co., 66 How. Pr. 51, 4 Civ. Proc. R. (Browne) 214.

[80] Code Civ. Proc. § 885.

The rule under the old Code was that no notice need be given (Erie

—— **Affidavit.** The affidavit must state that the applicant intends to make the motion, or that notice of a motion has been given which the applicant intends to oppose, and must specify the nature of the action and show that the affidavit or deposition is necessary thereon and that such person has refused to make an affidavit of the facts which the applicant verily believes are within his knowledge.[81] It should also specify the subject on which the witness was requested to depose and state that the deposition sought bears on the merits of the motion to be made.[82] It is not sufficient to state necessity and knowledge of witness on mere belief.[83]

—— **Form of affidavit.**

[Title and venue.]

A. X., being duly sworn, says:

I. That he is ———.

II. That this action has been commenced by the service of summons and complaint.

III. That this action is brought ——— [here specify the nature of the action].

IV. That deponent intends to make a motion to set aside the order of arrest granted in this action.

V. That in order to make said motion it will be necessary to have the affidavit of B. L. to show ——— [here state what is to be shown and why the particular affidavit is necessary].

VI. That on the ——— day of ———, 190—, deponent presented to the said B. L. the annexed affidavit and requested him to verify it, but B. L. refused to do so and has not yet done so.[84]

VII. That B. L. has knowledge of the following facts: [here insert facts claimed to be within his knowledge].

Ry. Co. v. Champlain, 35 How. Pr. 74), and the rule was the same under the present Code until its amendment by L. 1901, c. 526.

[81] Code Civ. Proc. § 885; Matter of Bannister, 1 Month. Law Bul. 9; Erie Ry. Co. v. Gould, 14 Abb. Pr., N. S., 179; Moses v. Banker, 30 Super. Ct. (7 Rob.) 131; Williams v. Western Union Telegraph Co., 3 Civ. Proc. R. (Browne) 448.

[82] Dauchy v. Miller, 16 Abb. Pr., N. S., 100.

[83] Cockey v. Hurd, 36 Super. Ct. (4 J. & S.) 42, 14 Abb. Pr., N. S., 183.

[84] This clause is based on a suggestion found in Dauchy v. Miller, 16 Abb. Pr., N. S., 100.

——Form of order to take deposition.

[Title of court and cause.]

[Judge's order or special term.]

On reading the annexed ——— of ———, and on motion of ———,

Ordered, that ———, of ———, attend before ——— who is hereby appointed a referee to take the deposition of ———, at ———, on ———, and testify as to facts embodied in the annexed affidavit which was presented to him to verify but which he refused to verify.

§ 569. Vacation or arrest of order.

The order may be vacated if irregular or improperly granted, but if the adverse party moves on the ground of irregularity, he must show that he is injured by such irregularity.[85] When the rule was that the application might be ex parte it was held that the adverse party had no right to move to vacate an ex parte order but that if there was anything in the contents, or in the mode of procuring the affidavit, to which the adverse party could object, his objection had to be made when the affidavit was sought to be used against him.[86] The rule is now, however, to the contrary, and the party may move to vacate. It seems that the witness may also move to vacate the order, but where the witness has appeared and submitted to examination, he can not move to vacate on the ground that he did not refuse to make an affidavit,[87] or that the proceedings to procure his attendance were irregular.[88]

The order should not be arrested merely because an affidavit has subsequently been tendered by the witness, unless it clearly appears that such affidavit is full and frank.[89]

§ 570. Procuring attendance of witness.

The person to be examined may be subpoenaed and compelled to attend as upon the trial.[90]

[85] Brooks v. Schultz, 3 Abb. Pr., N. S., 124; Ramsey v. Erie Ry. Co., 8 Abb. Pr., N. S., 174; Ramsey v. Gould, 57 Barb. 398.

[86] McCue v. Tribune Ass'n, 1 Hun, 469.

But where the adverse party was the witness, it was held that he could move. Spratt v. Huntington, 2 Hun, 341.

[87] Erie Ry. Co. v. Champlain, 35 How. Pr. 74.

[88] McCue v. Tribune Ass'n, 1 Hun, 469.

[89] Fisk v. Chicago, R. I. & P. R. Co., 3 Abb. Pr., N. S., 430.

[90] Code Civ. Proc. § 885.

§ 571. Conduct of examination.

The examination is before a referee. The witness must answer all proper questions[91] but can not be examined on the general merits of the controversy.[92] No good reason is apparent why the witness may not be allowed to examine books and papers, to refresh his memory, as in case of other depositions, though there is an 1868 decision to the contrary which, however, has been practically overruled by the decisions relating to other depositions.[93] The witness may be cross-examined by the party on whose attorney the notice has been served.[94]

§ 572. The deposition.

The deposition must be taken by question and answer and be subscribed by the witness, and must be delivered to the attorney for the party who procured the order, unless such order provides for a different disposition thereof.[95]

ART. III. NOTICE OF MOTION.

(A) REGULAR EIGHT DAY NOTICE.

§ 573. Definition.

A notice of a motion is, as the name implies, a notice in writing addressed to a certain person stating that a specified motion will be made at a place and time stated. A notice that an argument will be made in writing before a justice of the court to vacate an order previously made by him and to modify another order, cannot be said to be a notice of "motion" before a court.[96]

[91] Clark v. Brooks, 26 How. Pr. 254.

[92] Dauchy v. Miller, 16 Abb. Pr., N. S., 100; Erie Ry. Co. v. Gould, 14 Abb. Pr., N. S., 279.

[93] Fisk v. Chicago, R. I. & P. R. Co., 3 Abb. Pr., N. S., 430.

[94] This provision was introduced by amendment by L. 1901, c. 526. Previous thereto it was held that the attorney for the opposing party could not cross-examine. Reynolds v. Parkes, 2 Dem. Surr. 399; Camp v. Fraser, 4 Dem. Surr. 212; Keenan v. O'Brien, 2 N. Y. Supp. 242.

Contra,—Brooks v. Schultz, 3 Abb. Pr., N. S., 124.

[95] Code Civ. Proc. § 885.

[96] Wright v. Bowne, 79 Hun, 385.

§ 574. Necessity of notice.

Certain motions are required to be made on notice to the persons interested. Other motions, made before a judge out of court, may generally be made ex parte.[97] So likewise the court may often order a thing done of its own motion, in which case, of course, no notice of the application need be given.[98] Notice of motion is, of course, not necessary where the motion is an oral one made in the course of a trial when the attorneys for all the parties are present. The general rule is that after appearance, the opposite party should be given notice of every application to the court where he has any interest to appear and oppose it, with the exception of orders for time and of a similar nature.[99] This rule, however, does not apply to oral motions made pending the trial. The real test of the necessity of giving notice in a case not specifically provided for by law or the general rules of practice, is said to be whether the adverse party is to be affected by the order.[100]

Where an order affecting a substantial right is made in an action without notice to the party interested, it cannot be upheld upon the ground that, for aught that appears, the same order would be made after notice given.[101]

But one set of motion papers is necessary where one of the parties in actions between the same parties in the same court moves in each at the same time and with the same object.[102]

The statutes generally provide as to the necessity of notice of particular motions. No attempt will be made to collect such provisions at this time as they will be treated in connection with the practice to which the motion relates.

[97] An order for an examination before trial may be made ex parte (Code Civ. Proc. § 872) as may an order of arrest (Code Civ. Proc. § 556) or, in certain cases, an injunction order (Code Civ. Proc. §§ 606, 609).

[98] Thus the court may order, on its own motion, issues of fact sent to the jury in an equity case. Code Civ. Proc. § 971.

[99] Isnard v. Cazeaux, 1 Paige, 39.

[100] Matter of Salmon, 34 Misc. 251.

[101] Wheeler v. Emmeluth, 121 N. Y. 241.

[102] Hornfager v. Hornfager, 6 How. Pr. 13.

§ 575. Length of notice.

In the absence of any special provision of law or of a general rule of practice, a notice of a motion before a court or judge, if necessary, must, if personally served, be served at least eight days before the time appointed for the hearing, unless the court or a judge thereof, or a county judge of the county where the action is triable, or in which the attorney for the applicant resides, upon an affidavit showing ground therefor, makes an order to show cause why the application should not be granted, and, in the order, directs that service thereof less than eight days before it is returnable, be sufficient,[103] and except that where the attorneys for the respective parties reside or have their offices in the same city or village, such notice may be a notice of five days.[104] This provision applies notwithstanding the existence of a special statutory provision calling for at least eight days notice since the phrase "where special provision is not otherwise made by law," refers only to provisions of law which prescribe a shorter notice than eight days. The meaning of the section is that a notice of at least eight days shall be given, except in cases where the law specially provides for a shorter notice.[105] If service is made by mail the time is doubled, and the notice must be served within sixteen days before the time for the hearing. An order granted on shorter notice than eight days, unless an order shortening it has been granted, is reversible.[106]

§ 576. Contents.

A notice of motion is usually entitled in the action and states the names of the parties. The rules laid down in regard to entitling affidavits apply and will not be repeated.[107] In determining the sufficiency of the notice, the court inquires whether

[103] Code Civ. Proc. § 780; Rule 37 of General Rules of Practice; Vale v. Brooklyn Cross-Town R. Co., 12 Civ. Proc. R. (Browne) 102.

[104] Rule 37 of General Rules of Practice.

[105] Citizens' Sav. Bank v. Bauer, 49 Hun, 238.

[106] Rogers v. McElhone, 12 Abb. Pr. 292, 20 How. Pr. 441; People ex rel. City of New York v. Nichols, 79 N. Y. 582.

[107] Ante, § 529.

the attorney or party was misled by the defect,[108] and where no prejudice has resulted, a mere clerical misprision, such as an error in the title, will not affect the validity of the notice.[109]

If it is desired to make a person a party to the motion in his representative capacity, it is necessary that the notice of motion be addressed to him in his representative capacity and not as an individual.[110]

—— **Specification of grounds of the motion.** The notice must specify the grounds of the motion,[111] it being insufficient that the grounds are stated in the affidavits.[112] Where there are several grounds upon which a motion may be granted, those upon which the moving party means to rely must be distinctly stated, and to the grounds thus stated the party will be confined upon the hearing.[113] Failure to specify the grounds has been held to warrant a denial of the motion.[114]

When the motion is for irregularity, the notice must specify the irregularity complained of.[115] It is not sufficient to state the supposed irregularity in the moving affidavits only.[116] However, this rule only applies to motions for "irregularity" and not to such motions as motions to vacate for want of due service,[117] or a motion to vacate an order for insufficiency of the affidavit on which it was founded.[118] Irregularities not specified are deemed waived.

—— **Prayer for relief.** A notice of motion should contain a specific prayer for relief but may also contain a prayer for general relief, in addition to the particular relief asked for.

[108] Bander v. Covill, 4 Cow. 60.

[109] Quick v. Merrill, 3 Caines, 133.

[110] Duclos v. Benner, 25 State Rep. 413, 6 N. Y. Supp. 293.

[111] Wilson v. Wetmore, 1 Hill, 216; Boyd v. Weeks, 6 Hill, 71.

[112] Coit v. Lambeer, 2 Code R. 79; German-American Bank v. Dorthy, 39 App. Div. 166; Montrait v. Hutchins, 49 How. Pr. 105.

[113] Bowman v. Sheldon, 7 Super. Ct. (5 Sandf.) 657.

[114] Lewis v. Graham, 16 Abb. Pr. 126.

[115] Rule 37 of General Rules of Practice; Gurnee v. Hoxie, 29 Barb. 547; Selover v. Forbes, 22 How. Pr. 477.

[116] German-American Bank v. Dorthy, 39 App. Div. 166; Montrait v. Hutchins, 49 How. Pr. 105; Lewis v. Graham, 16 Abb. Pr. 126.

[117] Emerson v. Auburn & O. L. R. Co., 13 Hun, 150.

[118] Dauchy v. Miller, 16 Abb. Pr., N. S., 100.

It is also common practice for a moving party to embody in his notice an alternative prayer for relief, to the effect that, if the court denies his first request, he will ask something else as a substitute.[119]

—— **Naming place for hearing.** The notice of motion should state the place where the motion will be made, though a notice failing so to state has been held sufficient where the place was notorious,[120] and the notice of motion for a wrong county does not deprive the court of jurisdiction to make an order in the proper county.[121]

—— **Designation of date of hearing.** Except in the first and second districts and motions noticed to be heard in Erie county, "non-enumerated" motions in the supreme court must be noticed for the first day of the term or sitting of the court, accompanied by copies of the affidavits and papers on which the motion is to be made, and the notice shall not be for a later day, unless sufficient cause is shown in the affidavits served for not giving notice for the first day,[122] though where the reason of not noticing for the first day appears of record, no affidavit in excuse need be made.[123] In courts other than the supreme court, non-enumerated motions may be made on any day designated by the judges thereof.[124] In the appellate division, non-enumerated motions may be noticed for any motion day in the term.[125] Notice for "the next term" includes the first day of the term, and is good[126] even though it adds a particular day which is not in the term.[127] A notice cannot be in the alternative as to time but must state one certain time only.[128] Mistaking the first day of the term has been held a sufficient excuse.[129] The usual clause in the notice of motion "or as soon

119 Clark v. Clark, 11 Abb. N. C. 333.
120 Bodwell v. Willcox, 2 Caines, 104.
121 Wright v. Bowne, 79 Hun, 385.
122 Rule 21 of General Rules of Practice.
123 Kane v. Scofield, 2 Caines, 368.
124 Rule 21 of General Rules of Practice.
125 Rule 21 of General Rules of Practice.
126 Avery v. Cadugan, 1 Cow. 230.
127 Jackson v. Brownson, 4 Cow. 51.
128 Crane v. Crofoot, 1 How. Pr. 191.
129 Bayard v. Malcom, 3 Caines, 102.

thereafter as counsel can be heard," is not necessary, since the motion stands over as a matter of course where it cannot be heard on the day designated.[130]

In the first judicial district, motions may be noticed for any day during the term.[131]

The provision of rule 40 of the general rules of practice that "except in the appellate division of the supreme court, enumerated motions shall be noticed for the first day of the term by either party on a notice of eight days," was omitted by the convention of justices which was held in 1899.

——**Signature.** The notice must be signed by the attorney for the moving party,[132] as a notice of motion signed by the party himself is irregular.[133]

Form of notice of motion.

[Title of court and cause.]

Take Notice, That upon ——— affidavit ——— cop of which hereto annexed, and upon [mention pleadings papers or other proceedings relied upon] herein, this court will be moved at a special term thereof to be held at chambers, at the court house, in the city of ———, on the ——— day of ———, 190—, at —— o'clock a. m., of the day, or as soon thereafter as counsel can be heard, that ———, or for such further or other order in the premises as to the Court shall seem meet, with the costs of said motion.

Dated ———, 190—, Yours, &c.,

To ———, ———,

Attorney for Attorney for

§ 577. Service of notice.

The Code provides in detail for the manner of service of a notice or other paper in an action.[134] As these Code provisions relate not only to service of a notice of motion, but to service of all other papers in an action, except process, such provisions will be treated of in a separate subdivision in this chapter, to

130 Anonymous, 1 Johns. 143.

131 Rule 2 of Special Terms of First Department of Supreme Court.

132 Demelt v. Leonard, 19 How. Pr. 182.

Counsel may sign when attorney cannot be found. Bogert v. Bancroft, 3 Caines, 127.

133 Halsey v. Carter, 29 Super. Ct. (6 Rob.) 535.

134 Code Civ. Proc. §§ 796-802.

which reference should be made for the rules relating in general to the time and manner of service of notice of motion. Suffice it to state in this connection that rule 21 of the general rules of practice requires a notice of a non-enumerated motion, except in the first and second districts exclusive of Erie county, to be accompanied by copies of the affidavits and papers on which it is made, but this rule was not intended to and does not include pleadings already served and which need not be served again.[135] Affidavits served after the notice of motion cannot be used without leave of court, though if received without objection on the hearing, the objection is waived.[136]

§ 578. Proof of service.

Proof of due service of the notice is necessary where the adverse party does not appear to oppose the motion.[137]

§ 579. Counter notice.

It is proper for a party against whom a motion is made, to give a counter notice that, if the motion against him prevails, he will ask such relief on his part as would be appropriate in that contingency,[138] but where a party notices a motion for a certain place, the adverse party cannot notice a new motion at a different place to require the moving party to bring his motion at such place, since any reason why the motion should not be heard at the place fixed in the original notice should be presented to the court at such place.[139]

§ 580. Withdrawal of notice.

A notice of motion cannot be withdrawn or countermanded, without payment of the costs of the motion;[140] but where a

[135] Badger v. Gilroy, 21 Misc. 466.
[136] Rubins v. Mariano, 65 App. Div. 314.
[137] Rule 37 of General Rules of Practice.
For form of proof of service, see post, p. 667.
[138] Clark v. Clark, 11 Abb. N. C. 333.
[139] Thompson v. Erie Ry. Co., 9 Abb. Pr., N. S., 233.
[140] Bates v. Jaines, 8 Super. Ct. (1 Duer) 668; Walkenshaw v. Perzel, 32 How. Pr. 310.

motion, as originally noticed, was for two distinct purposes, the motion for the relief sought by the first part thereof, may be withdrawn without payment of the costs of the motion.[141]

§ 581. Vacation or quashing of notice.

Notice of motion, whether by order to show cause or a notice signed by attorney, is not a writ or process which can be vacated or quashed upon an independent motion therefor.[142]

§ 582. Waiver of objections.

Want of notice cannot be set up by a party who has appeared and contested any motion,[143] and formal objections to the notice of motion are waived by entering on the argument.[144] A short notice is waived unless objection is made on that ground on the day of the motion.[145]

§ 583. In City Court of New York.

In the New York city court, the notice of a motion must be not less than four days, unless the court or a justice thereof, on an affidavit showing grounds therefor, prescribes a shorter time, by an order to show cause; and except (1) notice of justification of sureties in an undertaking given by the plaintiff as security for the defendant's costs, which must not be more than two days; and (2) notice of an application for a judgment, or notice of a motion to strike out a pleading, or notice of an application for judgment on default, or the execution of a reference or writ of inquiry, or of an assessment thereupon, which must not be less than two days; and (3) notice of the justification of bail, which must not be less than two days nor more than ten days; and (4) notice of trial of an issue of fact or of an issue of law, or notice of the hearing of an appeal or of any other hearing, the time for serving which is not specially

141 Walkenshaw v. Perzel, 32 How. Pr. 310.

142 Matter of Van Ness, 21 Misc. 249; People v. New York Cent. & H. R. R. Co., 28 Hun, 543.

143 Crane v. Stiger, 58 N. Y. 625.

144 Roosevelt v. Dean, 3 Caines, 105.

145 Main v. Pope, 16 How. Pr. 271.

prescribed, which must not be less than five days; and (5) notice of taxation of costs, which must not be less than two days, except where all the attorneys serving and served with a notice reside or have their offices in the city of New York, in which case one day's notice is sufficient.[146]

(B) ORDER TO SHOW CAUSE.

§ 584. Definition and nature.

An order to show cause, sometimes called a rule to show cause, is an order made by the court, in a particular case, on motion of one of the parties, calling on the other to appear at a particular time before the court to show cause, if any he have, why a certain thing should not be done.[147] In the old practice an order to show cause was practically equivalent to a rule nisi. The practice of shortening, by order, the time for serving a notice of motion was introduced by the Code, as amended in 1851. Before that time it was not known. Under the practice that existed before the Code, motions were required to be noticed for the first day of term by a notice of at least eight days. A shorter notice was not provided for, but notice might be given for a later day in the term, on sufficient cause shown in the affidavits served.[148] An order to show cause is sometimes used as original process, but the order will be treated of in this connection as a short notice of motion. If there is urgent need that a motion be made and heard in less than eight days, the procedure is to obtain an order to show cause which will be made returnable in less than eight days and takes the place of a notice of motion,[149] but cannot be substituted for the latter except in the manner particularly pointed out and authorized by the Code provisions.[150] To proceed upon an order to show cause or short notice, rather than upon the regular eight day notice, is not an absolute right but is discretionary with the judge at chambers,[151] and short notice

146 Code Civ. Proc. § 3161.
147 Cyc. Law Dict. 816.
148 Larkin v. Steele, 25 Hun, 254.
149 Thompson v. Erie Ry. Co., 9 Abb. Pr., N. S., 233.
150 Proctor v. Soulier, 82 Hun, 353.
151 Sixth Ave. R. Co. v. Gilbert El. R. Co., 71 N. Y. 430.

should be allowed only in exceptional cases.[152] It is not to be understood that when a court grants an order to show cause they express in any degree an opinion on the merits. It would be unjust for the court to do so, because the order is ex parte, and the opposing party ought not to be, and is not, prejudiced. In granting an order to show cause, the court looks not at the merits, but at the question whether there is a necessity for a shorter notice than that of eight days.[153]

§ 585. Who may make.

An order to show cause may be made by the court or a judge thereof, or the county judge of the county where the action is triable or in which the attorney for the applicant resides,[154] but application is usually made to a judge out of court.

§ 586. Affidavit.

An order to show cause should in no case be granted, unless a special and sufficient reason for requiring a shorter notice than eight days is stated in the papers presented, and the party in his affidavit states the present condition of the action, and whether at issue, and, if not yet tried, the time appointed for holding the next special or trial term where the action is triable,[155] but failure of the affidavit to state facts showing that an order to show cause is necessary, affects only the order to show cause and not the order granted on such order, and hence the objection must be taken at the special term or it will be deemed to be waived.[156] An affidavit sufficiently shows the reason for making an order returnable in less than eight days, where it shows that the adverse party not only threatened to take possession of premises claimed by the moving party, but had actually begun to eject him and was continuing to disturb and annoy him in such possession.[157] So an order to show

152 Androvette v. Bowne, 4 Abb. Pr. 440.
153 Thompson v. Erie Ry. Co., 9 Abb. Pr., N. S., 233.
154 Code Civ. Proc. § 780.
155 Rule 37 of General Rules of Practice.
156 Wooster v. Bateman, 4 Misc. 431.
157 Springsteen v. Powers, 27 Super. Ct. (4 Rob.) 624.

cause why an order of arrest should not be vacated, sufficiently specifies a ground for short notice, where it states that during the period the arrest continued in force, defendant's personal character would suffer and his business interests be irreparably impaired.[158]

§ 587. Contents.

The requisites of an order to show cause are practically the same as those of a notice of motion. After its title it usually enumerates the motion papers and the name and representative capacity, if any, of the moving party, which is followed by the ordering part which specifies the time and place to appear and show cause why specified relief based on specified grounds should not be granted. It also usually provides for service of the order and the papers on which granted. It is dated and signed as are other orders. The order may be made returnable in more than eight days.[159] And the fact that the original order to show cause was without a return day, does not invalidate it where the copy served contains a return day, but an amendment nunc pro tunc inserting the return day contained in the copy should be allowed.[160] The fact that it is not entitled in the action is, however, not fatal, where the notice of motion to which it is annexed is so entitled as are the papers served with it.[161] When the motion is for irregularity, the order must specify the irregularity complained of,[162] even though it appears in the affidavits,[163] and irregularities not specified cannot be relied on,[164] though the objection that the irregularities are not specified is waived if not taken at the hearing.[165]

Rule 21 of the General Rules of Practice requiring non-enumerated motions to be noticed for the first day of the term, unless sufficient cause is shown in the affidavits served for not

158 Shaughnessy v. Chase, 23 Wkly. Dig. 228.
159 Matter of Ferris, 37 Misc. 606.
160 In re Quo Vadis Amusement Co., 81 N. Y. Supp. 394.
161 Paddock v. Palmer, 32 Misc. 426.
162 Rule 37 of General Rules of Practice; Sniffen v. Peck, 6 Civ. Proc. R. (Browne) 188.
163 Garner v. Mangam, 46 Super. Ct. (14 J. & S.) 365.
164 Skinner v. Noyes, 30 Super. Ct. (7 Rob.) 228.
165 Miller v. Kent, 59 How. Pr. 321.

giving notice for the first day, applies as well where there is an order to show cause as where there is a notice of motion.[166]

An attorney who has admitted due service cannot object that the order to show cause did not expressly direct that less than eight days service should be sufficient.[167] The annexing of affidavits to an order to show cause after its signature by the justice, is ground for refusing the application.[168]

Form of order..

[Title and venue.]

On reading the affidavit of ——— verified the ——— day of ———, 190—, let the ——— herein show cause before one of the ——— of this court, at a special term to be held at the chambers thereof, in the court house, in the city of ——— on the ——— day of ———, 190—, at ——— o'clock in the ——— noon of that day, or as soon thereafter as counsel can be heard, why ——— or why such further order or relief should not be granted as the court may deem proper, and in the meantime, and until the hearing and decision of this ——— all proceedings on the part of ——— are hereby stayed. Service of a copy of this order and of the papers on which it is granted on or before the ——— day of ———, 190—, shall be sufficient.

Dated ———, 190—.

§ 588. Where returnable.

An order to show cause, except in the first judicial district, is returnable only before the judge who grants it or at a special term appointed to be held in the district in which the action is triable.[169] In the first judicial district all orders to show cause must be returnable at the special term for hearing of litigated motions, except in cases where the special rules of the first district otherwise provide.[170] As will be seen more fully later, an order to show cause may be made returnable at a special term held with a circuit.[171] An order made by a judge which is returnable in the alternative, to wit, before me or one of the justices of the court, is sufficient, where the parties actually ap-

166 Power v. Village of Athens, 19 Hun, 165.
167 Anonymous, 3 Abb. N. C. 51, note.
168 Mendello v. Rosati, 30 Misc. 834.
169 Rule 37 of General Rules of Practice.
170 Rule 37 of General Rules of Practice.
171 Matter of Argus Co., 138 N. Y. 557.

peared before the judge who made the order, inasmuch as the latter part of it may be rejected as surplusage.[172] An order returnable on Sunday is a nullity.[173]

§ 589. Service.

The affidavit on which an order to show cause is based or a copy thereof, must be served with a copy of the order, or else the order may be disregarded.[174] An order to show cause need not be personally served on the party, it being sufficient that it be served on his attorney, where final judgment has not been entered,[175] and even where judgment has been entered in a divorce suit, service of an order to show cause why alimony should not be paid may be on the attorney and not on the party.[176] An order to show cause which requires two days' service on plaintiff's attorney, means personal service, where service by mail is not specified, and in such a case service by mail is irregular.[177]

§ 590. Stay of proceedings.

An order to show cause except in the first judicial district, served after the action has been noticed for trial, but within ten days of the trial term, does not stay proceedings in the action, unless made at the term where such action is to be tried, or by the judge who is appointed or is to hold such trial term, or unless such stay is contained in an order to show cause returnable on the first day of such term, in which case it shall not operate to prevent the subpoenaing of witnesses or placing the cause on the calendar.[178] It has been held that this rule does not embrace special terms at which cases are tried, but only trial terms.[179]

172 Rogers v. Baere, 1 Month. Law Bul. 45.
173 Arctic Fire Ins. Co. v. Hicks, 7 Abb. Pr. 204.
174 Code Civ. Proc. § 782.
175 Pitt v. Davison, 37 N. Y. 235; Zimmerman v. Zimmerman, 26 Abb. N. C. 366, 14 N. Y. Supp. 444.
176 Walker v. Walker, 20 Hun, 400.
177 Marcele v. Saltzman, 66 How. Pr. 205.
178 Rule 37 of General Rules of Practice.
179 Oakley v. Cokalete, 20 Misc. 206. The order was reversed in 16 App. Div. 65 without deciding this precise point.

§ 591. Notice on overruling objections to order.

Actual notice of a decision overruling a preliminary objection to an order to show cause and requiring the party to appear on the further day named, is sufficient notice to appear then, although no formal order is made and served.[180]

ART. IV. PLACE AND TIME FOR MOTION.

§ 592. Provisions as to county and district in which to move.

Where it is not specially prescribed by law that a motion may be made in the county where the applicant or other person to be affected thereby, or the attorney, resides, a motion "on notice" in an action in the supreme court must be made within the judicial district in which the action is triable or in a county adjoining that in which it is triable, except that a motion on notice cannot be made in the first judicial district in an action triable elsewhere.[181] This Code provision includes, however, only such motions as are made during the pendency of, or relate to, the suit, and it in no manner affects or controls such as may be made in other proceedings succeeding its final determination by a judgment,[182] nor does it apply where one motion is necessarily made and entitled in several actions, pending in different counties and judicial districts.[183] Where a motion which should properly be made in the district where the action is pending is irregularly made in another district, a motion to set aside the order made upon such irregular motion is properly made in the district in which the action is pending.[184]

In relation to injunction orders, however, it seems that a judge of the supreme court in an action pending in one judicial district may make an order restraining proceedings involving the same subject-matter between the same parties pending in another judicial district.[185]

180 Baker v. Stephens, 10 Abb. Pr., N. S., 1.
181 Code Civ. Proc. § 769.
182 Curtis v. Greene, 28 Hun, 294; Phillips v. Wheeler, 67 N. Y. 104.
183 Phillips v. Wheeler, 2 Hun, 603.
184 Attrill v. Rockaway Beach Imp. Co., 25 Hun, 376.
185 Platt v. Woodruff, 61 N. Y. 378.

—— **In the first judicial district.** In an action in the first judicial district, a motion on notice must be made in that district, except where it is specially prescribed by law that the motion may be made in the county where the applicant or other person to be affected thereby, resides. Likewise, with the same exception, a motion on notice cannot be made in the first district in an action triable elsewhere.[186] This Code provision applies, however, only to motions based upon notice.[187] It prevents the making of a motion in the second district in an action pending in Kings county to consolidate with such action one pending in the city and county of New York, and to direct a trial of the latter action in the county of Kings.[188]

A justice of the supreme court in another county cannot make an order vacating an order made in an action pending and triable in the first district,[189] and it was even held that where an action has been tried in the first judicial district and judgment entered therein by direction of the court requiring exceptions to be heard in the first instance at general term, a motion to vacate such judgment and amend the order by directing judgment to be meantime suspended, must be made in the first district and cannot be made in another district even before the justice who tried the action.[190]

—— **Motions relating to receivers and sequestration of property.** All motions for the sequestration of the property of corporations, or for the appointment of receivers thereof, must be made in the judicial district in which the principal place of business of said corporations, respectively, is situated, except that in actions brought by the attorney-general in behalf of the people of this state, when it shall be made to appear that such sequestration is a necessary incident, to the action, and that no receiver has already been appointed, a motion for the

186 Code Civ. Proc. § 769; Koehler v. Farmers' & Drovers' Nat. Bank, 25 State Rep. 222, 17 Civ. Proc. R. (Browne) 307, 6 N. Y. Supp. 470.

187 Hull v. Hart, 27 Hun, 21.

188 Dupignac v. Van Buskirk, 44 Hun, 45, 7 State Rep. 401, 26 Wkly. Dig. 238.

189 Koehler v. Farmers' & Drovers' Bank, 14 Civ. Proc. R. (Browne) 71.

190 Thompson v. Thompson, 52 Hun, 117, 22 State Rep. 471, 16 Civ. Proc. R. (Browne) 317, 4 N. Y. Supp. 842.

appointment of one may be made in any county within the judicial district in which such action is triable.[191] No motion can be made, or other proceeding had for the removal of a receiver, elsewhere than in the judicial district in which the order for his appointment was made.[192]

—— **Effect of agreement of counsel.** It is competent for counsel to agree to have a motion heard and decided at any special term in any county in the state, and the order made in it is reviewable when made in a county other than that designated by the Code, as if it were made in the proper county, since the jurisdiction of the special term is not limited to cases arising in the judicial district in which they are held.[193]

—— **Validity of order made in wrong county.** Inasmuch as the supreme court has jurisdiction throughout the state by virtue of the constitution, an order made in a county where, by statute, it could not properly be applied for, is not void but merely irregular.[194]

§ 593. Time for motion.

A motion to set aside a proceeding for irregularity must be made promptly, and before the moving party takes another step in the cause.[195] It was a strict rule of the old practice that a motion against a mere irregularity should be made at the first opportunity i. e. at the first special term, if the party had sufficient notice to put him on inquiry,[196] or else an excuse for not doing so should be shown,[197] but after the enactment of the old Code it was held that a motion against an irregularity need not be moved at the first special term under the existing judicial system by which the special terms in a judi-

191 Rule 80 of General Rules of Practice.
192 Rule 80 of General Rules of Practice.
193 Rice v. Ehle, 65 Barb. 185, 46 How. Pr. 153.
194 Blackmar v. Van Inwager, 5 How. Pr. 367.
195 Strong v. Strong, 1 Abb. Pr., N. S., 233; Persse & Brooks Paper Works v. Willet, 14 Abb. Pr. 119; Low v. Graydon, 14 Abb. Pr. 443; Lawrence v. Jones, 15 Abb. Pr. 110.
196 McEvers v. Markler, 1 Johns. Cas. 248.
197 Lawrence v. Jones, 15 Abb. Pr. 110.

cial district were held successively at different places in the district.[198] The principle that a motion must be made as soon as practical relates generally to a mere irregularity which is waived by delay,[199] and a mere notice from a party that he intends to proceed in a manner which would be irregular, does not make it necessary for the adverse party to apply to the court on that subject.[200] A seventeen years' delay before moving to set aside an order for irregularity has been held laches precluding the granting of the motion.[201] A motion to vacate an order may be denied on the ground of laches, as where it is sought to vacate an order granting leave to sue on a judgment made some four years after such order,[202] and a motion, though based on fraud, may be denied because of laches.[203] Where a party has lost his rights by lapse of time under statutory provisions relating to them, a motion for relief made after such time will be denied.[204]

—— **Excuses for delay.** It is an excuse for delay that the motion was previously noticed for a term which adjourned unexpectedly and it was therefore noticed at the earliest practical day of another term,[205] but the attorney's ignorance of the practice is no excuse.[206]

—— **Extension of time and relief from failure to move promptly.** The time within which a motion must be made may, in proper cases, be extended by an application therefor, or failure to move within the statutory time may be relieved against.[207]

198 Titus v. Relyea, 8 Abb. Pr. 177, 16 How. Pr. 371; Bulkley v. Bulkley, 6 Abb. Pr. 307.

199 Doty v. Russell, 5 Wend. 129.

200 Vandenburgh v. Van Rensselaer, 6 Paige, 147.

201 Matter of McKenna, 31 Abb. N. C. 416.

202 Van Arsdale v. King, 87 Hun, 617, 33 N. Y. Supp. 858, 67 State Rep. 611.

203 Matter of McKenna, 31 Abb. N. C. 416.

204 Depew v. Dewey, 2 Thomp. & C. 515.

205 Whipple v. Williams, 4 How. Pr. 28.

206 Moreland v. Sanford, 1 Denio, 660.

207 Post, §§ 683, 684.

ART. V. COURT OR JUDGE BEFORE WHOM TO MOVE.

§ 594. In general.

A motion must be made to a court or to a judge or justice thereof.[208]

§ 595. Special terms.

The general rules of practice provide that non-enumerated motions shall be heard at special term, except when otherwise directed by law, and that contested motions shall not be noticed or brought to a hearing at any special term held at the same time and place with a trial term, except in actions upon the calendar for trial at such term, and in which the hearing of the motion is necessary to the disposal of the cause, unless otherwise ordered by the justice holding the court; and except, also, that in counties in which no special term distinct from a trial term is appointed to be held, motions in actions triable in any such county may be noticed and brought on at the time of holding the trial and special term in the county in which such actions are triable.[209] This rule of practice, however, may well be construed as referring alone to those incidental applications ordinarily denominated motions, which are made during the progress of an action or special proceeding after its commencement, and not as embracing an application which is the foundation of a statutory remedy.[210] The object of the rule is to prevent interference with the ordinary work of a circuit by the interjection of motion business bearing no relation to cases on the calendar, and also to prevent the inconvenience to counsel of being compelled to attend a special term held in connection with a circuit, upon motions in outside cases where the hearing might be delayed by the regular calendar business. The rule is one primarily regulating the conduct of attorneys. The rule does not undertake to exclude a judge at special term, engaged at the same time in holding a circuit from entertaining a motion noticed for such term, if, in his judgment, the circumstances and the rights and interests in-

[208] Code Civ. Proc. § 768, as amended by L. 1900, c. 147.
[209] Rule 38 of General Rules of Practice.
[210] Matter of Argus Co., 138 N. Y. 557.

volved render it proper that he should do so. He may refuse to hear a contested motion at such a term upon the ground that it was irregularly noticed, but if he chooses to exercise the undoubted jurisdiction of a judge holding a special term, whether separately or in connection with a court to dispose of any non-enumerated business appertaining to that branch of the court, and the parties are before him, the rule constitutes no limitation upon his power.[211]

—— **Terms adjourned to chambers.** Ex parte motions may, of course, be heard at terms adjourned to the judge's chambers, as may contested motions, where the parties consent.[212] The fact that the order adjourning the court to the chambers of the justice stated that it was "for ex parte business only," does not prevent the justice from hearing, if he sees fit, contested motions brought on by consent.[213]

—— **In first judicial district.** In the first judicial district of the supreme court there is a special term for the hearing of "litigated motions" which commences on the first Monday of each month and continues until the Friday preceding the first Monday of the succeeding month. The term is held on every day except Saturdays, Sundays and legal holidays. It is known as special term, part 1.[214] All motions must be noticed to be heard at, and all orders to show cause must be returnable at, the special term for hearing of litigated motions, except in cases where the special rules of the first judicial district require such motion to be made at some other term of the court.[215] Notes of issue are required to be filed with the clerk two days before the day on which the motion is noticed to be heard, except where an order to show cause is granted, in which case the clerk places the motion on the calendar at any time before the day for hearing, on the submission to him of the order to show cause and the filing of a note of issue, or the justice assigned to such part of the court may place the motion on the

211 Matter of Argus Co., 138 N. Y. 557.
212 Matter of Wadley, 29 Hun, 12.
213 Matter of Wadley, 29 Hun, 12.
214 Rule 1 of First Department of Supreme Court.
215 Rule 37 of General Rules of Practice.

calendar on the day on which the order to show cause is returnable, and such calendar is called at the opening of the court and no motion can be heard which is not on the calendar.[216]

Application for all court orders, ex parte or by consent, where notice is not required or has been waived, must be made to part 2 of the special term for the transaction of ex parte business.[217] This special term is held on the first Monday of each month and continuing to and including the Saturday prior to the first Monday of the following month.[218]

In addition to parts 1 and 2, there are six other special terms of the supreme court for the trial of issues of law and issues of fact triable by the court and for the hearing and decision of all other matters and special proceedings not otherwise provided for which are known respectively as parts 3, 4, 5, 6, 7 and 8. Each term commences on the first Monday of each month and continues until the fourth Friday succeeding the first Monday.[219] Part six of the special term is devoted to the hearing and determination of litigated motions to be sent to such part by the justice holding part one of the special term.[220] No special term can be continued beyond the Friday preceding the commencement of a new term, except for the purpose of completing a trial already commenced during the term, in which case, immediately upon the completion of the trial, the court shall adjourn for the term.[221]

§ 596. Court or judge out of court.

Any application or motion made when defendants have defaulted in appearing in an action or proceeding, may be made to the court or to a judge or justice thereof out of court, but where any of the defendants in an action or proceedings have appeared, all motions or applications thereafter made in such action or proceedings, must be made to the court, unless such defendants consent to the making of such motion or application

216 Rule 2 of First Department of Supreme Court.
217 Rule 5 of First Department of Supreme Court.
218 Rule 4 of First Department of Supreme Court.
219 Rule 7 of First Department of Supreme Court.
220 Rule 1 of First Department of Supreme Court.
221 Rule 12 of First Department of Supreme Court.

to a judge or justice out of court.[222] An order made by a judge out of court may be vacated by him or by the court, except where otherwise specially prescribed by statute.[223] Ex parte motions such as motions for order of arrest, to stay proceedings, to extend time to answer, and the like, are ordinarily made out of court, while special motions made on notice to the opposite party, or on an order to show cause, unless the Code expressly provides otherwise, can only be made to the court.[224] Although under the Code a special term may be adjourned to the chambers of any judge of the court residing within the district, yet no contested motion requiring notice can be brought on at such adjourned term except by consent of all parties.[225] A judge out of court may make an order to show cause irrespective of whether the matter to be heard on the subsequent motion may be heard out of court.[226]

Whether a motion shall be made to the court or to a judge, in particular cases, depends on the wording of the statute.

—— **Motions in first judicial district.** In the first judicial district, a motion which elsewhere must be made in court, may be made to a judge out of court, except for a new trial on the merits.[227] The same power exists in a judge out of court in the first district as is possessed by the court in other districts.[228] However, a judge's order is not invalid merely because made in court. In the first district, though the judge acting at chambers also holds in the same room a special term for the hearing of non-enumerated motions, motions should be noticed for the proper branch of the court.[229]

—— **Motions in New York city court.** In the New York city court, the judge assigned to the special term attends to the chamber business during the prescribed term for which he is assigned by the court.[230]

222 Code Civ. Proc. § 768 as amended by L. 1900, c. 147.
223 Code Civ. Proc. § 772.
224 Cayuga County Bank v. Warfield, 13 How. Pr. 439.
225 Matter of Wadley, 29 Hun, 12.
226 Matter of Argus Co., 138 N. Y. 557, 565.
227 Code Civ. Proc. § 770.
228 Lachenmeyer v. Lachenmeyer, 26 Hun, 542.
229 Bates v. United Life Ins. Ass'n, 68 Hun, 144.
230 Rule 23 of Rules of City Court of New York.

§ 597. Judges who may make ex parte orders in actions in other courts.

The Code provides that an order in an action which may be made by a judge of the court, out of court, and without notice, may be made by any judge of the court in any part of the state, where the particular judge is not specially designated by law, or, except to stay proceedings after verdict, report or decision, by a justice of the supreme court, or by the county judge of the county where the action is triable or in which the attorney for the applicant resides.[231] This Code provision has been held to apply only to ordinary orders and not to injunction orders or other orders granting provisional remedies concerning which the Code has made special provisions.[232]

—— **County judges.** The limitation that only a county judge of the county where the action is triable or in which the attorney for the applicant resides, may make an order in an action pending in another court, where the order is one which may be made out of court without notice, does not apply to a case where it is prescribed by the statute, in general words, that a particular order may be made by a county judge or by any county judge.[233] For example, the power to grant injunctions, orders of arrest, and attachments, is conferred on county judges by the Code without limitation in actions pending in the supreme court, and hence the fact that the action is not triable in the county where the application is made, does not preclude the power of the county court in such cases.[234] Notwithstanding that this Code rule limits the power of a county judge to make orders in actions pending in the supreme court to such orders as are made out of court and without notice, and confers on him no jurisdiction to hear and decide a contested motion,[235] other Code provisions confer power on a county judge, in certain instances, to hear a contested motion in an action pending in another court.[236]

231 Code Civ. Proc. § 772.
232 People ex rel. Roosevelt v. Edson, 52 Super. Ct. (20 J. & S.) 53, 1 How. Pr., N. S., 482.
233 Code Civ. Proc. § 773.
234 Kennedy v. Simmons, 1 Hun, 603.
235 Parmenter v. Roth, 9 Abb. Pr., N. S., 385.
236 Code Civ. Proc. §§ 609, 772.

—— **Judges of supreme court.** As has already been stated in another chapter, any justice of the supreme court may make an order in an action or special proceeding in a county court, where the county judge could make such order out of court.[237]

—— **Actions in New York city court.** A judge of another court cannot make an order in an action brought in the New York city court.[238]

§ 598. Before whom application may be renewed.

The Code provides that if an application for an order, made to a judge of the court, or to a county judge, is wholly or partly refused, or granted conditionally, or on terms, a subsequent application, in reference to the same matter, and in the same stage of the proceedings, shall be made only to the same judge, or to the court; and that if it is made to another judge, out of court, an order granted thereupon must be vacated by the judge who made it, or, if he is absent, or otherwise unable to hear the application, by any judge of the court, upon proof, by affidavit, of the facts.[239] It is seen by the language of this provision that it refers only to ex parte orders. It is within the power of one special term when the merits of the application present a proper case, to open for the purpose of a rehearing an order made by another special term confirming the report of a referee, particularly if the order has been substantially taken upon default,[240] but the power should be rarely exercised. A motion denied at a special term by the justice to put a cause on the short cause calendar cannot be renewed at a succeeding special term by another justice without leave obtained from the first justice.[241]

—— **Punishment for violation of rule.** A person making a second application for an order or for judgment, where forbidden by either section 776 or section 777 of the Code, with

237 Ante, c. 3; Code Civ. Proc. § 354.
238 Code Civ. Proc. § 327.
239 Code Civ. Proc. § 776.
240 In re Hartman, 23 Wkly. Dig. 128.
241 Kalichman v. Nadler, 34 Misc. 809.

knowledge of the previous application, is punishable by the court for a contempt.[242]

§ 599. Motion to vacate or modify order.

A motion to vacate or modify an ex parte order, other than one granting a provisional remedy, may be made with or without notice to the judge who made it, or with notice, to the court.[243] In other words, an order, not relating to a provisional remedy, but made by a justice of the court without notice, may be vacated by the court, although the justice presiding may be another and different person from the one making the order.[244] An "ex parte" order, although entitled at special term, may be vacated on notice at special term, although held by another judge.[245]

Except in such cases and orders relating to provisional remedies, one justice of the court is not authorized to vacate or modify the orders made by another,[246] and hence a motion in one district of the supreme court to set aside an order, granted on a full hearing in another district, in an action there pending, is improper, even though the order affects the conduct of an action in the district where the motion is made.[247] An error of the special term cannot be corrected by a motion made at another, but can only be remedied by an appeal,[248] and hence the only way in which a party can be relieved from the terms imposed as a condition of the granting of a favor asked for, is by appeal to the general term, or by application to the same justice who held the court at the time the order was made.[249]

242 Code Civ. Proc. § 778.

243 Code Civ. Proc. § 772.

244 People v. National Trust Co., 31 Hun, 20.

See, also, Knapp v. Post, 10 Hun, 35; Lawrence v. Lynch, N. Y. Daily Reg., April 11, 1884; Talcott v. Burnstine, 13 State Rep. 552, 28 Wkly. Dig. 178; In re National Trust Co., 4 Civ. Proc. R. (Browne) 203; Madsen v. Slocovich, 4 Month. Law Bul. 84.

245 Matter of Brake, 59 How. Pr. 329.

246 Platt v. New York & S. B. R. Co., 170 N. Y. 451; Morganstern v. Endelman, 36 Misc. 860.

247 National Bank of Ft. Edward v. Goodwin, 6 Hun, 481.

248 First Nat. Bank of Rondout v. Hamilton, 50 How. Pr. 116

249 Finelite v. Finelite, 41 State Rep. 158, 16 N. Y. Supp. 287.

But a motion to reargue a motion made at the regular special term for the hearing of non-enumerated motions, should not be dismissed because the judge who decided the original motion does not preside when the motion for a reargument is brought on, since the proper course in such a case is to refer the application to the justice who decided the original motion or to defer the hearing until he presides at the regular special term for the hearing of non-enumerated motions.[250]

The reason why it is not fit that one judge should sit in review of the decisions and judgments of another judge of the same court, rests not so much on a want of power to correct what has been mistakenly done as the confusion and vexatious litigation that would be likely to arise from so unwise a course in the administration of justice.[251]

Where an order was erroneously granted at the circuit, under the old system of courts, the special term had jurisdiction to vacate it.[252]

—— **Exceptions to rule.** Exceptions to the rule stated above are cases (1) where the justice has died or ceased to be a member of the court, and (2) orders taken without notice or by default. In those events, as the observance of the rule would be impracticable for the purpose of securing what may be just and right, the application for a reconsideration of the order may then be made before a court held by another justice.[253] So if a judge has ordered a reference and has retired from the bench in the meantime, a motion to confirm the referee's report may be made at special term held by another judge.[254] Another exception to the rule that a party cannot indirectly appeal from one judge to another of co-ordinate jurisdiction by motion for relief from an order or judgment against

250 Averell v. Barber, 44 State Rep. 542. Presiding Justice Van Brunt dissented on the ground that while the motion for reargument should not be denied it should be dismissed because improper to appeal from one special term to another.

251 Fisher v. Hepburn, 48 N. Y. 41; Matter of Livingston, 34 N. Y. 555.

252 First Nat. Bank of Union Mills v. Clark, 42 Hun, 90.

253 People v. National Trust Co., 31 Hun, 20; Thompson v. Erie Ry. Co., 9 Abb. Pr., N. S., 233.

254 Sprouil v. Star Co., 45 App. Div. 575.

him, but must appeal to a higher court, is where the court which made the order was entirely without jurisdiction, since one is not bound to appeal from a void order, but may resist it and assert its invalidity at all times.[255]

ART. VI. HEARING.

§ 600. Time for hearing.

The general calendar practice has been treated of in another chapter, but it may be stated that short contested motions not heard on the day for which they are noticed, in consequence of the inability of the court to hear the same, stand over, as a matter of course, until the next day, unless a different disposition be made by the direction of the judge, or the consent of parties.[256] For the calendar rules of the special terms in the first judicial district, reference should be made to the chapter on calendar practice and to the rules for the regulation of the special terms of the supreme court in the first judicial district.[257]

——**Postponement.** The hearing of a motion may be postponed, as in case of a trial, for good cause shown, but it will not be postponed to give time to prepare affidavits, unless a good reason is shown for not being prepared,[258] such as that leave has just been granted to produce affidavits in answer to new matter set up in the opposing affidavits.

§ 601. Place of hearing and before whom.

The hearing should be in the place, and before the court or judge, named in the notice of motion or in the order to show cause, but it seems that an order to show cause why an order of arrest should not be vacated, granted by the judge who made the order for arrest, may be afterwards heard before another judge.[259]

255 Kamp v. Kamp, 59 N. Y. 212.
256 Mathis v. Vail, 10 How. Pr. 458.
257 Cumming & Gilbert's Official Court Rules, pp. 239-254.
258 Jackson v. Ferguson, 3 Caines, 127.
259 Charles Roome Parmele Co. v. Haas, 67 App. Div. 457.

—— **Transfer of motion.** But where notice of a motion is given, or an order to show cause is returnable, before a judge, out of court, who, at the time fixed for the motion, is or will be absent, or unable, for any other cause, to hear it, the motion may be transferred, by his order, made before or at that time, or by the written stipulation of the attorneys for the parties, to another judge, before whom it might have been originally made.[260] In the first judicial district, whenever the justice assigned to either part 1, part 2 or part 3 of the special term is disqualified from hearing any application or motion brought before him, he may send such application to such other part of the special term as he may select, to be there heard and disposed of.[261]

§ 602. Burden of proof.

The burden of proof lies on the party holding the affirmative of each particular issue. If the party opposing the motion admits the principal allegations on which it is founded, but sets up new matter in avoidance, the burden of proof falls on him.[262]

§ 603. Right to open argument.

The party who notices a motion or who obtains an order to show cause, is regarded as the moving party, and as such entitled to open and close the argument,[263] though on motions at special term, it is not very material which party opens or closes, and a reviewing court will only inquire into the correctness of the decisions where the order denies or grants the motion.[264]

§ 604. Time for argument.

At the hearing of causes at a special term, not more than one counsel shall be heard on each side, and then not more than

260 Code Civ. Proc. § 771.

261 Rule 5 of Special Term Rules of First Department of Supreme Court.

262 Shearman v. Hart, 14 Abb. Pr. 358.

263 Thompson v. Erie Ry. Co., 9 Abb. Pr., N. S., 233; New York & Harlem R. Co. v. City of New York, 1 Hilt. 562.

264 People v. New York Cent. & H. R. R. Co., 28 Hun, 543.

one hour each, except when the court shall otherwise order.[265] In the first judicial district, but one counsel on each side can be heard and not more than fifteen minutes is allowed to each counsel, unless the court otherwise directs.[266]

§ 605. Evidence in addition to original affidavits.

The moving affidavits and the opposing affidavits being before the court, it is necessary to consider whether the court or judge is limited to the hearing of argument by counsel as to the law or whether he may obtain further light as to the facts and if so how.

—— **Papers to be furnished on enumerated motions.** The papers to be furnished on "enumerated" motions at special term are a copy of the pleadings, when the question arises on the pleadings or any part thereof, or a copy of the special verdict, return or other papers on which the question arises.[267]

—— **Supplementary affidavits.** A moving party has no absolute right to introduce on the hearing of a motion, additional proof in answer to the affidavits of the opposing party, except where such right is guaranteed by statute, as in case of motions to vacate or modify an injunction,[268] but affidavits or other documents may be introduced to establish the general reputation of a person whose character has been impeached,[269] though it has been held that whether supplementary affidavits are ever to be received on a motion is questionable, and that, if ever received, it should be with an opportunity to the party to produce counter-affidavits.[270]

—— **Reference.** If the material allegations of a motion are denied by a counter-affidavit so that an issue of fact is distinctly raised, it is common, and in many cases necessary, that such is-

265 Rule 47 of General Rules of Practice.
266 Rule 2 of Special Term Rules of First Department of Supreme Court.
267 Rule 40 of General Rules of Practice.
268 Code Civ. Proc. § 627; Cagney v. Fisher, 34 Hun, 549.
269 Clark v. Frost, 3 Caines, 125.
270 Merritt v. Baker, 11 How. Pr. 456.

sue should be solved by a reference,[271] though there is a line of cases which hold that where the material question of fact rests on conflicting evidence, the party seeking relief should be left to his action, provided relief can be obtained in that form.[272] Section 1015 of the Code authorizes the court to direct a reference to determine and report upon a question of fact arising in any stage of the action, upon a motion or otherwise, but said section does not seem to authorize a reference to obtain the opinion of a referee upon questions of law arising on a motion.[273] The report of the referee is, however, not conclusive on the court which may act on the findings or may disregard them entirely.

——**Examination of witnesses before judge.** As the court may order a reference where the facts are conflicting, it would seem, a fortiori, that the court itself may examine witnesses and hear oral proof, and it is so held,[274] though it is also held that a judge before whom a motion is heard at a special term, cannot direct the responding party to appear before him and be examined orally touching the matters of fact involved in the controversy; and upon his refusing to submit to such examination, determine the matter against him, as upon the confessions of the allegations presented by the party making the motion.[275]

As has already been stated,[276] the affidavit or deposition of any third person to use in making or opposing a motion may be compelled by an order.

§ 606. Effect of pendency of another motion.

The court should not entertain and dispose of a motion while another motion for the same purpose is pending in the same court undetermined,[277] though a pending motion in another ac-

271 Matter of New York, L. & W. Ry. Co., 99 N. Y. 12, 17.

272 Hill v. Hermans, 59 N. Y. 396; Van Etten v. Hasbrouck, 4 State Rep. 803, 25 Weekly Dig. 283.

273 Kelly v. Charlier, 18 Abb. N. C. 416.

For a note on the power of the court to take oral proof on the hearing of motion, by reference or otherwise, see 23 Abb. N. C. 476.

274 Matter of New York, L. & W. Ry. Co., 99 N. Y. 12, 17.

275 Meyer v. Lent, 7 Abb. Pr. 225.

276 Ante, §§ 564-572.

277 Hoover v. Rochester Printing Co., 2 App. Div. 11.

tion between the same parties, is not necessarily a bar to the latter motion.[278]

—— **Of action.** The pendency of an action seeking the same relief as is sought in a motion, is ground for denying the motion.[279]

§ 607. Scope of hearing as limited by notice of motion.

The hearing must be as to the grounds set forth in the notice of motion or in the order to show cause. If the notice of motion specifies an irregularity as the ground, the hearing can not be as to the merits.[280]

§ 608. Final disposition of motion.

A judge before whom a motion comes for hearing may dispose of the motion as follows:

1. Dismissal without consideration of merits. This is proper where the motion is an unnecessary one,[281] or where preliminary objections to a motion, such as that the matter is res judicata, seem to be insurmountable.[282, 283]

2. Absolute denial of motion.

3. Denial of motion without prejudice to another motion or expressly granting leave to renew.

4. Denial of motion without prejudice to an action, where an action and not a motion is deemed the proper remedy.

5. Allowance of amendment to defeat motion. On a motion to set aside irregular proceedings, it is the settled practice to allow trifling mistakes to be amended without requiring a cross-motion,[284] when the court can see, from the nature of the case, that no valid objection can be made to the amendment, in case a motion is specifically made for that purpose.[285]

278 Jackson v. Smidt, 7 Wkly. Dig. 516.

279 Matter of Mott, 36 Hun, 569; McLaren's Ex'rs v. McLaren, 6 Wend. 537; New York El. R. Co. v. Manhattan Ry. Co., 63 How. Pr. 14.

280 Asinari v. Volkening, 2 Abb. N. C. 454.

281 Bull v. Melliss, 13 Abb. Pr. 241.

282, 283 Irving Nat. Bank v. Kernan, 3 Redf. Surr. 1.

284 Jones v. Williams, 4 Hill, 34; Wolford v. Oakley, Sheld. 261; Inman v. Griswold, 1 Cow. 199; Spalding v. Spalding, 3 How. Pr. 297.

285 Garcie v. Sheldon, 3 Barb. 232.

§ 609. Affirmative relief to opposing party.

While affirmative relief may be granted to a party opposing a motion where he serves a cross notice of motion, it is irregular to grant affirmative relief to a party opposing a motion, upon matters appearing in the opposing papers which the moving party has had no opportunity to answer.[286]

§ 610. Conformity to relief sought by motion.

In the absence of a prayer for general relief in the notice of motion or in the order to show cause, a party is confined to the objects specified in his notice.[287] Thus a judgment cannot be set aside on a motion merely to set aside the execution.

——**Prayer for general relief.** Under a prayer for general relief, the party may have any relief consistent with the case made by the affidavits.[288] For example, a new defendant may be ordered joined in an action under a prayer for other relief in a motion to dissolve an injunction,[289] and irregular proceedings may be ordered stricken out under the prayer for general relief in a notice of motion to amend such proceedings,[290] and where, on a motion to vacate a judgment for irregularity, leave is given to enter a fresh judgment, the moving party may, under the prayer for other and further relief, be permitted to appear and demand a copy of the complaint,[291] and plaintiff can obtain leave to amend the summons under the general prayer, in a notice of motion to bring in new parties, "for such other order or relief as the court shall see fit to grant."[292]

But under a general prayer for relief every possible relief should not be granted, but it should be allied to what is asked for and not entirely distinct therefrom.[293] Thus under a notice of a motion that the answer be stricken out as frivolous,

286 Garcie v. Sheldon, 3 Barb. 232.
287 Requard v. Theiss, 19 Misc. 480.
288 Ferguson v. Jones, 12 Wend. 241; Barstow v. Randall, 5 Hill, 518; Bissell v. New York Cent. & H. R. R. Co., 67 Barb. 385.
289 Martin v. Kanouse, 2 Abb. Pr. 390.
290 Boylen v. McAvoy, 29 How. Pr. 278.
291 Ward v. Sands, 10 Abb. N. C. 60.
292 Walkenshaw v. Perzel, 32 How. Pr. 310.
293 Boston Nat. Bank v. Armour, 50 Hun, 176.

"or for such or further order," etc., the plaintiff cannot demand judgment. To effect this, the words "judgment" or "relief" should have been used instead of "order."[294] Leave to renew a motion cannot be granted under the general prayer for relief, where there are no facts in the moving papers on which to found such particular relief.[295]

Where a party has mistaken the practice and moved for an order to which he is not entitled, it is discretionary with the court whether to grant the proper relief under a general prayer.[296]

—— **Order by default.** Where no one opposes the motion, only the things specifically asked for will be granted, though where opposition is made, relief may be given under the general or alternative prayer.[297]

§ 611. Default of opposing party.

If the opposite party does not appear to oppose the motion the party making it is entitled to the rule or judgment moved for, on proof of due service of the notice or order and papers required to be served by him, unless the court otherwise directs.[298] A motion, though not opposed, cannot be granted if proof of service is insufficient,[299] but a party who relies on the attention of the court and does not attend to oppose, cannot after the lapse of a term, object to the insufficiency, if the court failed to notice it.[300] If a motion is noticed for a day out of an appointed term, failure to bring it on the day specified, precludes the right to take a default on a subsequent day.[301]

—— **Of moving party.** If the party making the motion does not appear, the court should deny the motion on the filing of a

294 Darrow v. Miller, 5 How. Pr. 247, 3 Code R. 241.
295 Bellinger v. Martindale, 8 How. Pr. 113.
296 Van Slyke v. Hyatt, 46 N. Y. 259.
297 Rogers v. Toole, 11 Paige, 212; Anderson v. Johnson, 3 Super Ct. (1 Sandf.) 713.
298 Rule 37 of General Rules of Practice.
299 Jackson v. Giles, 3 Caines, 88.
300 Caines v. Brown, 3 Caines, 89, note.
301 Vernovy v. Tauney, 3 How. Pr. 359.

copy, notice of motion, or order to show cause,[302] though the rule formerly was that where a party neglects to make a motion which he has noticed, there is no right to deny it, but only to give costs for not appearing.[303]

§ 612. Time for decision.

A decision on an application to obtain, vacate, modify or set aside an order of arrest, injunction order, or warrant of attachment, must be made within twenty days after the application is submitted for decision.[304]

[302] Rule 37 of General Rules of Practice; Bolles v. Duff, 55 Barb. 313.

[303] Thompson v. Erie Ry. Co., 9 Abb. Pr., N. S., 233.

[304] Code Civ. Proc. § 719.

CHAPTER III.

ORDERS.

ART. I. NATURE, RENDITION AND ENFORCEMENT.

§ 613. Definition and nature.

An order is defined by the Code as a direction of a court or judge not contained in a judgment, made as prescribed in the Code in an action or special proceeding, which must be in writing, unless otherwise specified in the particular case.[1] At common law, an order was called a rule. A difference exists be-

[1] Code Civ. Proc. § 767.

tween the direction for an order and the order itself, inasmuch as a mere oral decision is of no effect without an order making it of record.[2]

An order must be in writing,[3] but an entry by the clerk in the minutes of the court is a compliance with the rule.[4] An order differs from a requisition in that an order is a mandatory act while a requisition is a request.[5] The presumption is that an order is made on sufficient proof.[6] An order is to be construed according to its terms without reference to the opinion of the court.[7] An order granting the moving party a favor is not imperative upon him unless so expressed.[8]

——**Difference between order and judgment.** It has been said that the difference between an order and a judgment is that the one is interlocutory, while the other is final.[9] This distinction is not satisfactory, however, as a judgment is defined by the Code as either interlocutory or the final determination of the rights of the parties to an action.[10] An interlocutory judgment is defined as an intermediate or incomplete judgment, where the rights of the parties are settled but something remains to be done, as when there is an accounting to be had, a question of damages to be ascertained, or a reference required to determine the amount of rent due for use and occupation.[11] It has been decided that the disposition at special term of a demurrer is a judgment,[12] but the later authorities hold that such disposition is an order,[13] though where there is a

2 Smith v. Spalding, 26 Super. Ct. (3 Rob.) 615, 30 How. Pr. 339.
3 Code Civ. Proc. § 767.
4 Gerity v. Seeger & Guernsey Co., 163 N. Y. 119.
5 Mills v. Martin, 19 Johns. 7.
6 Dayton v. Johnson, 69 N. Y. 419.
7 Fisher v. Gould, 81 N. Y. 228.
8 Neill v. Wuest, 17 Abb. Pr. 319, note.
9 Nolton v. Western R. Corp., 10 How. Pr. 97.
10 Code Civ. Proc. § 1200.
11 Cambridge Valley Nat. Bank v. Lynch, 76 N. Y. 514.
12 Lewis v. Acker, 8 How. Pr. 414; Bentley v. Jones, 4 How. Pr. 335.
13 Nolton v. Western R. Corp., 10 How. Pr. 97; Cook v. Pomeroy, 10 How. Pr. 105, 221; Bauman v. New York Cent. R. Co., 10 How. Pr. 218; Ford v. David, 13 How. Pr. 193; Church v. American Rapid Telegraph Co., 47 Super. Ct. (15 J. & S.) 558.

direction for a judgment by reason of the frivolousness of a pleading, it is held that there is a final determination of the rights of the parties within the meaning of the Code, and it is a judgment rather than an order.[14] The granting of a new trial is an order and not a judgment,[15] as is the decision of a judge in settling interrogatories.[16] An order is usually the result of a motion though a motion may seek a judgment rather than an order.

§ 614. Kinds of orders.

Besides ex parte orders and orders based on notice, orders are distinguishable as orders of the court and orders of a judge, the distinction being that the one kind is made by a judge acting as a court, while the other is made by a judge out of court, at chambers or in vacation. It is essential that the statutes be closely followed in this respect, as an order made out of court, where the statute requires it to be made by the court, is usually invalid, and vice versa, though the form of the order is not conclusive as to whether it was made in court or out of court.[17]

Orders are classified for the purpose of determining whether an appeal may be taken as "final" or "interlocutory" and as orders "affecting a substantial interest" and orders not "affecting a substantial interest."

Oftentimes an order is entered by consent of the parties. In such a case all objections thereto are waived, except the one that the court or judge has no jurisdiction of the subject matter. Ordinarily, mere consent of the parties does not authorize the entry of an order but application must be made to a judge who grants the order as a matter of course. An order by consent usually recites the consent of the parties, and such recital is conclusive where not contradicted.[18]

A judge may, in certain cases, make an order on his own motion, but such orders are usually made at the trial or where a

[14] Phipps v. Van Cott, 4 Abb. Pr. 90.
[15] Duane v. Northern R. Co., 4 How. Pr. 364.
[16] Uline v. New York Cent. & H. R. R. Co., 79 N. Y. 175.
[17] Post, p. 619.
[18] Smith v. Grant, 11 Civ. Proc. R. (Browne) 354.

statute provides that the judge or the court "must" do, or refrain from doing, a certain act in the course of a pending litigation. It would seem, however, that an order affecting the rights of a party should be made of a court's own motion only in exceptional cases and where an absolute necessity requires.

Orders to show cause have already been treated of as a substitute for a notice of motion. In the old practice such an order was called a rule nisi.

§ 615. Formal requisites.

The formal requisites of an order are the caption, the date, the signature, and a direction to enter.

—— **Caption.** The caption of a judge's order, as distinguished from a court order, merely names the court and county, and the parties. The caption of a court order includes the designation of the term of court, the place where such term is held, the date of the order, the name of the justice or justices present, and the names of the parties. The mere entitling an order as at special term, which by law may be, or was, made before a judge out of court,[19] or which was made on the trial of an action,[20] does not, however, vitiate the order, since the caption of an order does not necessarily control, and hence where an order purports to be a special term order, but it is signed by the judge with his full name and no direction is given to enter it and it is not entered, it is a judge's order.[21] The objection is merely one of form which is amendable.[22]

In the first judicial district, an order made by a judge out of court which in other districts would be required to be made in

[19] Matter of Knickerbocker Bank, 19 Barb. 602, followed People ex rel. Caldwell v. Kelly, 35 Barb. 444; Caldwell's Case, 13 Abb. Pr. 405; Wickes v. Dresser, 4 Abb. Pr. 93, 13 How. Pr. 331; Main v. Pope, 16 How. Pr. 271; Lachenmeyer v. Lachenmeyer, 26 Hun, 542; Phinney v. Broschell, 19 Hun, 116.

[20] Smith v. Coe, 30 Super. Ct. (7 Rob.) 477.

[21] Atlantic & P. Telegraph Co. v. Baltimore & O. R. Co., 46 Super. Ct. (14 J. & S.) 377.

[22] Phinney v. Broschell, 80 N. Y. 544; Coffin v. Lesster, 36 Hun, 347.

court, should be entitled and signed as a judge's order and not as a court order.[23-25]

—— **Date.** The date of a court order appears in the caption while the date of a judge's order precedes his signature. It is the general practice to date a court order as of the day the motion is made, though the decision is not rendered until afterwards.[25] An order should not be postdated.[26]

—— **Signature.** A court order is not signed but the word "enter" is written by the judge at the foot of the paper with the initials of his name and title as follows "A. B., J." An order made out of court is always signed by the judge who made it, who adds his title and the date.

—— **Direction to enter.** An order made in court usually contains a direction to the clerk to enter it, while an order made out of court does not contain such a direction, though the mere fact that it does, does not invalidate it or conclusively determine its character as an order of court or an order of a judge.[27]

§ 616. Contents.

An order should state the basis therefor, which is usually done by commencing the body of the order with the words "On reading and filing," etc., with a recital of the papers and evidence considered, followed by the name of the moving and opposing counsel, and concluding with the specific directions which may be called the ordering part.

—— **Specification of motion papers.** The General Rules of Practice provide that the order must specify all the papers used or read on the motion on either side.[28] This requirement is to prevent confusion and dispute as to the papers used upon a motion, so that they may be easily identified,[29] and the absolute right of a party to have recited in the order and filed an important affidavit made and read on the motion in his behalf, can-

[23-25] Lachenmeyer v. Lachenmeyer, 26 Hun, 542.
[26] Smith v. Coe, 30 Super. Ct. (7 Rob.) 477.
[27] Phinney v. Broschell, 19 Hun, 116.
[28] Rule 3 of General Rules of Practice; Deutermann v. Pollock, 36 App. Div. 522; Schecker v. Woolsey, 2 App. Div. 52.
[29] Faxon v. Mason, 87 Hun, 139.

not be limited by imposing a condition.[30] This rule is not satisfied by a statement that the motion was based on "all the papers and proceedings in the action,"[31] or that it was based on certain papers and "upon all the pleadings and proceedings in this action."[32]

An affidavit which neither the court nor the opposing counsel was advised was offered in opposition to a motion, need not be recited in the order,[33] nor need the order recite that a certain affidavit was presented and read in opposition to the motion, where such affidavit was not of such a character as to entitle the party to submit it as a matter of right and the court in its discretion refused to allow it to be read, though by stipulation it was printed with the record for the inspection of the court.[34] But where a paper is used on the hearing of a motion by the successful party, he is precluded from thereafter claiming that the paper so used was unnecessary, as an excuse for not specifying such paper in the order.[35]

—— **Admissions, consents, etc., not reduced to writing.** Admissions or stipulations made and consents given on the hearing of motions, if not reduced to writing, should as matter of practice, be incorporated in the order to be entered thereupon, and thus made part of the record for future guidance, in case the propriety of the order is afterwards called in question.[36]

—— **Ordering part.** An order should be sufficiently specific to enable the party commanded to do, or refrain from doing, an act, to clearly understand his duty so that he may escape punishment by contempt proceedings or otherwise for a failure to obey the order, but it is unnecessary for the judge to specify in the order the ground upon which he grants or denies a motion.[37]

—— **Terms and conditions.** Whether terms may be imposed as a condition of granting or denying a motion, depends on

30 Thousand Island Park Ass'n v. Gridley, 25 App. Div. 499.

31 Hobart v. Hobart, 85 N. Y. 637; Faxon v. Mason, 87 Hun, 139; Southack v. Southack, 61 App. Div. 105.

32 Southack v. Central Trust Co., 62 App. Div. 260.

33 Silo v. Linde, 31 Misc. 264.

34 Matter of Wendover Ave., 48 State Rep. 868.

35 Farmers' Nat. Bank v. Underwood, 12 App. Div. 269.

36 Smith v. Grant, 11 Civ. Proc. R. (Browne) 354.

37 Glines v. Supreme Sitting Order of Iron Hall, 50 State Rep. 281.

whether the motion is one of right which the judge or the court is required to grant, or whether it is one which may be granted or denied in the sound discretion of the judge or court. In the latter case, reasonable terms may be imposed. However, a moving party cannot complain of a condition in the order granted on his application to the court for a favor, where he has thereafter accepted the favor.[38] Where the moving papers are defective, the order denying the motion should ordinarily grant an opportunity to renew the motion on new papers, by providing that it is without prejudice to a renewal on new papers.[39]

Where the motion is granted unless the other party complies with a certain condition, and such party fails to so comply, the practice is to present an affidavit ex parte that he has failed to do so, and take a final and absolute order, which is granted by the judge as a matter of course on the reading of the affidavit.[40]

—— **Payment of costs.** The order should provide for the payment of costs by the one party or the other.[41]

—— **Contents of order granted on petition.** Orders granted on petitions, or relating thereto, must refer to the petition by the names and descriptions of the petitioners, and the date of the petition, if dated, without reciting or setting forth the tenor or substance thereof unnecessarily.[42]

Form of special term order.

At a Special Term of the Supreme Court, of the State of New York, held in and for the City and County of ———, [or held at the Chambers of Judge], at the Court House, in the City of ———, on the ——— day of ———, 19—.

Present: THE HONORABLE

———, Justice.

[Title of cause.]

On reading and filing ——— and on motion of ——— attorney,

It is ordered that ———

Enter,

[Initials and title of presiding judge.]

38 Simmons v. Simmons, 32 Hun 551.
39 Turtle v. Turtle, 31 App. Div. 49.
40 Stewart v. Berge, 4 Daly, 477.
41 Rules relating to costs, see post, volume III.
42 Rule 27 of General Rules of Practice.

Form of judge's order.

[Name of court and name of county if action in supreme court.]
[Title of cause.]
On reading and filing ———, and on motion of ———, attorney ———.
It is ordered that ———.
[Date.]
[Signature of judge with initials of official title.]

§ 617. Settlement of order and entry.

The chancery practice in this state prior to the Codes, in regard to drawing up and entering an order, was for the solicitor for the successful party to draw up the order and, if it was one of course, to deliver it to the register to be passed and entered, or to procure the register to draw up and pass the order. The order was then considered perfected. If the order was not entered within twenty-four hours, any party interested might apply to the register to draw it up and enter it at the expense of the party so requesting. On the other hand, if the order was special in its provisions, the party entitled to draw it up was required to submit a copy thereof to the adverse party to enable him to propose amendments thereto. The draft and the amendments proposed, if any, were then delivered to the register to settle and enter the order. If he could not understand the decision of the court so as to be able to settle the order in conformity therewith, he could then apply to the court to settle the order.[43]

At present, the ordinary practice is for the attorney who procures an order, to draw it himself and submit it to the judge for his signature or a direction to enter with his initials attached. The next step is for the attorney to furnish the clerk with the order and the papers on which the decision was based and to cause the order to be entered by the clerk. The clerk then enters the order in the proper book, without any special directions from the court.[44] But unless all the papers used or read on the motion on either side are filed, the clerk should not enter the order except when otherwise specially directed by the court.[45]

[43] Whitney v. Belden, 4 Paige, 140.
[44] Matter of Rhinebeck & C. R. Co., 8 Hun, 34.
[45] Rule 3 of General Rules of Practice.

The successful party to a motion may enter the order, but if he fails to do so, the adverse party may enter the same without in any way impairing his right to appeal therefrom, and so, too, if the order as originally entered by the successful party does not conform to the decision, the adverse party may move for a resettlement, which, if granted, will not deprive him of appeal, nor of his right to move for a reargument of the motion.[46] An order is not irregular because signed and entered some months after the trial at which the decision was made.[47]

An order made at special term cannot be entered as an order of a judge.[48]

The court, on entering an order upon a motion, has the power to modify or add to the decision announced by him, though where the clerk enters an order upon the decision of a judge, such decision must be strictly followed.[49] If the order is erroneous, it cannot be disregarded and a different order entered, inasmuch as the order must follow the direction of the court.[50]

——**Necessity.** An order is not complete until entered, but an ex parte order made at chambers by a judge need not be entered with the clerk,[51] though if the motion is before a judge out of court on notice, the order must be entered by the prevailing party.[52] An order in a special proceeding must be entered with the clerk of the county in which the special proceeding is taken, if it is before a county officer, or a judge of a court established in a city; if before a justice of the supreme court, with the clerk of a county designated by the justice; or, if no designation is made by him, of a county where one of the parties resides.[53]

No order is complete, so that an appeal can be taken from it, until it is entered and the motion papers are filed.[54] Even in the case of a formal order it has been held that the written di-

[46] Lanahan v. Drew, 44 State Rep. 769, 17 N. Y. Supp. 840.
[47] Smith v. Coe, 30 Super. Ct. (7 Rob.) 477.
[48] Lippincott v. Westray, 6 Civ. Proc. R. (Browne) 74.
[49] Post v. Cobb, 13 State Rep. 555, 28 Weekly Dig. 362
[50] Williams v. Murray, 2 Abb. Pr., N. S., 292, 32 How. Pr. 187.
[51] Savage v. Relyea, 3 How. Pr. 276, 1 Code R. 42.
[52] Savage v. Relyea, 3 How. Pr. 276, 1 Code R. 42.
[53] Code Civ. Proc. § 825.
[54] Star Fire Ins. Co. v. Godet, 34 Super. Ct. (2 J. & S.) 359; Smith v. Dodd, 3 E. D. Smith, 215.

rection of the judge at the foot of the order, "Enter this," will not suffice for the purpose of appeal, but actual entry must be made.[55]

—— **One or more orders.** In actions between the same parties and in the same court, when one of the parties moves in each at the same time and with the same object, only one order upon the decision should be entered.[56] So where several applications are decided or several directions in a cause are given at the same time by the court, unless the court otherwise directs, the whole should be embraced in one order. And if anything is omitted, the other party should not enter an additional order, but apply to have it corrected.[57] Likewise, a single order to pay money in five actions into court, is proper, especially where it prevents the multiplication of costs.[58]

—— **Where order should be entered.** An order should generally be entered in the county of the place of trial, but when the order is to be entered in a county other than that in which the motion is made, and the affidavits and papers upon a non-enumerated motion are required by law or by the rules of the court to be filed, the clerk must deliver to the party prevailing in the motion, unless the court otherwise directs, a certified copy of the rough minutes, showing what papers were used or read, together with the affidavits and papers used or read upon such motion, with a note of the decision thereon, or the order directed to be entered, properly certified.[59] The party to whom such papers are delivered must file them and enter the proper order in the proper county within ten days thereafter, or the order may be set aside as irregular, with costs.[60]

—— **As of what term.** Although the judge may decide a matter in court after the adjournment of the term, the order must be entered as of the term when the matter was submitted.[61]

55 Whitaker v. Desfosse, 20 Super. Ct. (7 Bosw.) 678.

56 Hornfager v. Hornfager, 6 How. Pr. 13, Code R., N. S., 180.

57 Hunt v. Wallis, 6 Paige, 371.

58 Whitman v. Haines, 21 State Rep. 41, 4 N. Y. Supp. 48.

59 Rule 3 of General Rules of Practice; Bronner v. Loomis, 17 Hun, 439.

60 Rule 3 of General Rules of Practice.

61 People ex rel. Galsten v. Brooks, 40 How. Pr. 165.

—— **Effect of failure to enter.** Failure of the clerk to enter an order of court, does not render it irregular,[62] and an order duly made at special term with a direction of the judge at the foot, that it be entered, where duly filed in the proper clerk's office on the day of its date and the day of the filing indorsed thereon by the clerk is effectual as a basis for a lien, though by the mistake of the clerk it was not at the time transcribed in the records.[63] So failure to enter does not entitle the successful party to defeat a fresh proceeding on the ground that the prior proceedings are still pending,[64] nor give the adverse party a right to agitate the same question by a fresh motion, since the unsuccessful party can enter the order if the prevailing party omits to do so,[65] though notice of an order required to be entered with the clerk cannot be given until the order has been actually entered.[66]

§ 618. Service and notice.

The general rule is that an order must be served on the opposite party, or his attorney, in all cases where the rights of the other party may be affected or prejudiced by any proceedings taken under the order, though such service is not necessary where the order neither requires anything of the adverse party nor is designed to prevent him from doing anything which could have been done or taken without it,[67] nor is service on the moving party necessary.[68] So where a favor is granted to a party on condition, e. g. leave to amend on payment of costs, he must, at his peril, take notice of the order of the court, without waiting to be served with a copy of the rule, and comply with its conditions within the proper time or he will lose the benefit of the rule.[69] An order not in terms requiring personal service,

62 People v. Central City Bank, 53 Barb. 412, 35 How. Pr. 428.
63 Vilas v. Page, 106 N. Y. 439, 455.
64 Shults v. Andrews, 54 How. Pr. 380.
65 Peet v. Cowenhoven, 14 Abb. Pr. 56; Wheeler v. Falconer, 30 Super. Ct. (7 Rob.) 45.
66 Gallt v. Finch, 24 How. Pr. 193.
67 Ladd v. Ingham, 3 How. Pr. 90.
68 Mottram v. Mills, 3 Super. Ct. (1 Sandf.) 671.
69 Willink v. Renwick, 22 Wend. 608.

where made pending the litigation may be served on the attorney for the party.[70] Very often the order may be served on a representative. For example, an order against a sheriff may be served on his deputy.[71]

Court orders are served by delivering a certified copy thereof under signature of the clerk,[72] but where an order is made ex parte at chambers, the affidavit or a copy thereof must be served with a copy of the order,[73] though it is not necessary to exhibit the judge's signature on serving such an order.[74]

In order to limit the time for appealing, a copy of the order and a written notice of its entry must be served on the attorney of the opposing party,[75] but as such question is properly one of appellate practice, it will not be considered.

The rules relating to the manner of service of an order are governed by the Code provisions relating generally to the service of papers other than process and will not be noticed in this connection, except in so far as to state that service may be made by simply delivering a copy to or for the person on whom the service is to be made, unless contempt proceedings are contemplated, in which case it is necessary to exhibit at the same time the original order,[76] There are many special statutory provisions relating to the manner of service of particular orders which will not be considered in this connection, but which will be treated of hereafter in connection with the proceedings to which the order relates.

If the successful party unreasonably delays in serving the order, he may lose all his rights thereunder.[77]

§ 619. Enrollment and docketing.

The general rules of practice provide that any order or judgment directing the payment of money or affecting the title to

70 Flynn v. Bailey, 50 Barb. 73.
71 Whitman v. Haines, 21 State Rep. 41, 4 N. Y. Supp. 48.
72 City of New York v. Conover, 5 Abb. Pr. 244.
73 Savage v. Relyea, 3 How. Pr. 276.
74 Whitman v. Johnson, 10 Misc. 730; Gross v. Clark, 1 Civ. Proc. R. (McCarty) 17.
75 Code Civ. Proc. § 1351.
76 Gross v. Clark, 1 Civ. Proc. R. (McCarty) 17.
77 Harris v. Van Wagenen, 14 Wkly. Dig. 212.

property, if founded on a petition, where no complaint is filed, may, at the request of any party interested, be enrolled and docketed, as other judgments.[78] This rule refers only to orders granted on "petitions" where no complaint is filed, and was intended to cover that class of applications that could be made only on petition, and does not relate in any way to orders entered upon the decision of ordinary motions.[79] It does not provide for the entry of a judgment on an order, but merely allows an order directing the payment of a sum of money to be enrolled and docketed as if it were a judgment.[80] In other words, where the appropriate remedy is by petition, and the final order is entered directing a party thereto to pay a sum of money to the party in whose favor the order is entered, either party is entitled to have the order enrolled and docketed as a judgment, but a final order in a special proceeding cannot be the basis of a separate and independent judgment.[81]

§ 620. Waiver of objections.

The objection to an order may be waived by the presence of the party and his acquiescence therein,[82] but where the court improperly and ineffectually made an order, the acceptance of costs laid as a condition did not create an estoppel to deny the validity of the order.[83]

§ 621. Order as stay of proceedings.

The Code provides that all proceedings on the part of the party required by an order to pay the costs of a motion or other sum of money, except to review or vacate the order, are stayed without further direction of the court until the payment thereof,[84] but that the adverse party may, at his election, waive the stay of proceedings.[85] The general rules of practice provide that

[78] Rule 27 of General Rules of Practice.
[79] Myer v. Ahbett, 20 App. Div. 390.
[80] Schreyer v. Deering, 30 App. Div. 609.
[81] Schreyer v. Deering, 30 App. Div. 609.
[82] King v. Barnes, 51 Hun, 550, 558.
[83] Ross v. Ross, 31 Hun, 140.
[84] Code Civ. Proc. § 779, construction, see Vol. 2.
[85] Code Civ. Proc. § 779.

no order, except in the first judicial district, served after the action is noticed for trial and within ten days of the trial term, stays the proceedings in the action, unless made at the term where such action is to be tried or by a judge who is appointed or is to hold such trial term, or unless such stay is contained in an order to show cause returnable on the first day of such term, in which case it shall operate to prevent the subpoenaing of witnesses or placing the cause on the calendar.[86]

§ 622. Enforcement of order

As to the enforcement of an order, the Code provides that where the costs of a motion or any other sum of money directed by an order to be paid, are not paid within the time fixed for that purpose by the order, an execution against the personal property only of the party required to pay the same may be issued by any party or person to whom the said costs or sum of money is made payable by said order or in case permission of the court shall be first obtained by any party or person having an interest in compelling payment thereof, which execution shall be in the same form, as nearly as may be, as an execution on a judgment, omitting the recitals and directions relating to real property.[87]

——**By contempt proceedings.** The Code provides that nothing in the provision specifying the manner of enforcement of an order shall be so construed as to relieve a party or person from punishment as for contempt of court for disobedience of an order in any case when the remedy of enforcement by such proceedings exists.[88] The enforcement of orders by contempt proceedings has already been treated of.[89]

§ 623. Collateral attack.

The general rules relating to collateral attack on judgments apply to orders. If an order is merely "irregular," it cannot be collaterally attacked in another action or proceeding on the

[86] Rule 37 of General Rules of Practice.
[87] Code Civ. Proc. § 779.
[88] Code Civ. Proc. § 779.
[89] Ante, §§ 378-389.

ground of such irregularity, but if it is "void" for want of jurisdiction of the court or judge to make it, it may be attacked or disregarded in any other action or proceeding, notwithstanding no effort has been made to vacate it or to appeal from it.[90] Hence, the right to collaterally attack an order depends on whether it is void or voidable and the question whether an order is void depends on whether the court had jurisdiction.[91] As to jurisdiction, the recital in an order of jurisdictional facts is prima facie and, if not affirmatively disproved, conclusive evidence of their existence when drawn in question collaterally.[92] The rule is that all recitals in an order, though not conclusive, are presumptive evidence of their truth.[93] Hence, a chamber order which is entirely unauthorized, is void.[94]

Where an order is merely irregular, the person against whom it is made must obey it, or move to vacate it, or appeal from it, since in such case it is only voidable.[95] An order made in violation of the rules of practice is merely irregular,[96] and hence an irregular order of the court made ex parte is not void,[97] nor is an order made by an interested judge.[98]

§ 624. Appeal.

The right to appeal from an order is a question of appellate practice not within the scope of this work, but it is proper to state that an appeal does not lie from an order entered by con-

[90] Libby v. Rosekrans, 55 Barb. 202; Wilson v. Barney, 5 Hun, 257; Prentiss v. Nichols, 16 Wkly. Dig. 73.

[91] Spencer v. Barber, 5 Hill, 568; Methodist Episcopal Church v. Tryon, 2 How. Pr. 132; Schenck v. McKie, 4 How. Pr. 246; United States Trust Co. v. New York, W. S. & B. Ry. Co., 6 Civ. Proc. R. (Browne) 90, 67 How. Pr. 390.

[92] Agricultural Ins. Co. v. Barnard, 96 N. Y. 525; Palmer v. Colville, 63 Hun, 536; Wright v. Nostrand, 94 N. Y. 31.

[93] Smith v. Grant, 11 Civ. Proc. R. (Browne) 354.

[94] Hunt v. Wallis, 6 Paige, 371.

[95] King v. Barnes, 51 Hun, 550; Studwell v. Palmer, 5 Paige, 166; Gould v. Root, 4 Hill, 554; Pinckney v. Hagerman, 4 Lans. 374.

[96] Osgood v. Joslin, 3 Paige, 195.

[97] Davenport v. Sniffen, 1 Barb. 223; Harris v. Clark, 10 How. Pr. 415.

[98] Jewett v. Albany City Bank, 2 Ch. Sent. 39.

sent,[99] nor from an order granted on default,[100] and that the right to appeal very often depends on whether the order "affects a substantial interest."[101]

ART. II. MODES OF RAISING OBJECTIONS TO ORDERS.

(A) GENERAL RULES.

§ 625. Enumeration of remedies and differences between them.

If a party to a motion is dissatisfied in whole or in part with an order which has been made, his remedies are as follows:

1. Motion to vacate the order.
2. Motion to amend the order.
3. Motion to resettle the order.
4. A second motion usually preceded by leave of court.
5. Appeal (in some cases).

The difference between these proceedings will now be noticed. If the relief sought by a motion or cross-motion is granted, and the losing party deems the order erroneous on the merits or because of technical defects, he may move to vacate or, in certain instances, may appeal.

A motion to vacate is usually the more appropriate where the objection relates to technical defects while an appeal, if allowable, is more often taken where the merits are concerned.

If a motion has been denied and new facts have since arisen, a second motion may be made, and even if the facts remain the same a motion for leave to renew may be made. This is called a renewal or rehearing of the motion. It is a common remedy of a defeated moving party. The difference between a re-hearing of the motion and a re-settlement of the order, is that the one is granted where the order is erroneous on the merits, while the latter is granted only where the order does

[99] Dawson v. Parsons, 74 Hun, 221; Flake v. Van Wagenen, 54 N. Y. 25; Innes v. Purcell, 58 N. Y. 388; Atkinson v. Manks, 1 Cow. 693.

[100] Matter of Peekamose Fishing Club, 5 App. Div. 283.

[101] See topic "Appeal" in 1 Abb. Cyc. Dig.

not correctly express the decision made or does not correctly recite the papers on which it is based.[102]

A distinction is also to be noticed between an application based on section 724 of the Code, to be relieved from an order because taken through the applicant's "mistake, inadvertence, surprise or excusable neglect," and an application for a rehearing. The one is merely a motion to vacate while the other is usually an application to vacate and in addition to grant the relief originally sought.[103]

§ 626. Review of order made by judge of another court.

An order, made by a judge of a court other than the court in which the action is pending, may be reviewed in the same manner, as if it was made by a judge of the court, in which the action is pending.[104]

(B) RESETTLEMENT, MODIFICATION AND AMENDMENT.

§ 627. Resettlement and modification of order.

A resettlement of an order is a modification of it, and as we have already seen it differs from a rehearing in that a resettlement is granted only where the order does not correctly express the decision made or does not correctly recite the papers on which it is based.[105] If the order entered does not contain the proper recitals, the proper practice is to move for a re-settlement of the order, which result cannot be reached by a motion for judgment.[106] Where there is any dispute upon the question as to what papers were used, the declaration of the justice hearing the motion is conclusive. But where it appears that the justice was under a misapprehension, and that a certain paper was used by the plaintiff in opposing the defendant's motion, the latter under the rules is entitled to have that fact recited in the order.[107] On the other hand, a re-set-

[102] Butterfield v. Bennett, 30 State Rep. 302, 8 N. Y. Supp. 910.
[103] Matter of Blackwell, 48 App. Div. 230.
[104] Code Civ. Proc. § 774.
[105] Ante, § 625.
[106] Mooney v. Ryerson, 8 Civ. Proc. R. (Browne) 435.
[107] Farmers' Nat. Bank v. Underwood, 12 App. Div. 269.

tlement will not be granted merely because error was committed in granting the original order or in failing to impose proper terms thereon.[108]

—— **Consent order.** An order by consent cannot be modified or varied in an essential part, without the assent of both parties to such order, although the court may give such further directions as are necessary to carry such order into effect, according to its spirit and intent.[109] Where one party to an action has, by his own voluntary act, induced the other party to consent to change an order by adopting his own phraseology, he is not in a position to require the court to nullify such act and consent by a third order restoring the one originally made.[110]

§ 628. Amendments.

A mistake or defect in an order is usually amendable.[111] For example, an order may be amended by striking out the caption and inserting in place thereof another court,[112] or by adding a recital of the papers on which the order was founded.[113] So an order by consent erroneously stating defendant's Christian name is amendable.[114] But the same formalities are requisite to confer jurisdiction upon a judge or court to amend or correct an order previously granted in a matter in litigation as would be necessary to obtain the order in the first instance,[115] and it seems that an order cannot be amended so as to make the court rule on a question which has never been presented to it, as where the amendment is allowed by a judge other than the one who granted the order.[116]

108 Bloomingdale v. Steubing, 10 Misc. 229.

109 Leitch v. Cumpston, 4 Paige, 476.

110 Lant v. Rasines, 18 Misc. 414.

111 Church v. United Ins. Co., 1 Caines, 7; People ex rel. Boylston v. Tarbell, 17 How. Pr. 120.

112 Coffin v. Lesster, 36 Hun, 347; Mojarrieta v. Saenz, 80 N. Y. 553.

113 Matter of Post, 38 State Rep. 1, 14 N. Y. Supp. 205.

114 People ex rel. Boylston v. Tarbell, 17 How. Pr. 120.

115 Simmons v. Simmons, 32 Hun, 551.

116 Wingrove v. German Sav. Bank, 2 App. Div. 479.

When a party obtains an undue advantage by using an order of the court for a purpose contrary to its spirit and intention, and which could and would have been guarded against had the unlawful purpose been disclosed when the order was made, the court has power to deprive him of this advantage, resulting from an abuse of the order, by modifying or amending it, or granting a new order to correct the abuse.[117]

——**Nunc pro tunc.** The theory upon which an order may be granted to take effect as of a previous date, is that some ruling has been made which was not properly, or was improperly, entered. A court has no power to have a new order or ruling so entered, thus bringing into the record an element which did not previously exist. The facts must exist, and then if the record of them is imperfect or incomplete, it may be amended, but if the record shows the actual facts then no order can be properly made changing them so as to take the place of an act that was required to be previously performed. While a court may record an existing fact nunc pro tunc, it cannot record a fact as of a prior date when it did not then exist.[118] An order may be amended nunc pro tunc so as to conform it to the original direction of the court where the parties have proceeded under the order on the assumption that it was as directed and not as actually entered,[119] and the omission of an order to show that it was made at a regularly adjourned special term, or the failure to enter it, may be supplied nunc pro tunc when necessary to sustain proceedings had in good faith and otherwise unexceptionable.[120] Likewise a court of record has power to substitute a proper order for an improper one, even though the substituted order may incidentally alter or reverse the advantage or benefit which strangers had gained by reason of the order inadvertently made.[121]

117 De Lancey v. Piepgras, 141 N. Y. 88.

118 Guarantee Trust & Safe Deposit Co. v. Philadelphia, R. & N. E. R. Co., 160 N. Y. 1.

119 Matter of May, 53 Hun, 127.

120 People v. Central City Bank, 53 Barb. 412, 35 How. Pr. 428.

121 American Hosiery Co. v. Riley, 12 Abb. N. C. 329.

(C) VACATION OF ORDER.

§ 629. Power of judge.

The officer or a judge who has power to make an order has power to modify or revoke it.[122] Where an order made out of court without notice by one other than a judge of the particular court, grants a provisional remedy, it can be vacated only in the mode specially prescribed by law. In any other case it may be vacated or modified with or without notice by the judge who made it, or by the court on notice.[123]

§ 630. Opening order by default.

Defaults taken on motion at special term are opened as matter of course on excuse being shown,[124] but the hearing must be based on the identical papers on which it was moved.[125] A motion, on excuse, to open an order taken by default, is not a review of a previous decision on a matter whereon both parties have been heard, within the rule as to leave of court to renew,[126] and an order made after the filing of papers in opposition and after fully hearing counsel is not to be deemed taken by default, within the rules as to leave to open, merely because it was finally made in the absence of the counsel, after adjournment for his convenience.[127] A default taken upon a motion to overrule a demurrer as frivolous will not be opened, if the demurrer was in fact frivolous.[128]

§ 631. Motion to vacate or appeal.

As has already been stated, an appeal generally is proper only where matters of substance are involved while a motion is the proper remedy where the objections relate to matters of

122 Belmont v. Erie Ry. Co., 52 Barb. 637; Moore v. Merritt, 9 Wend. 482; Bigelow v. Heaton, 2 How. Pr. 207; Levy v. Loeb, 5 Abb. N. C. 157, 44 Super. Ct. (12 J. & S.) 291.

123 Code Civ. Proc. § 772; Whitman v. Johnson, 10 Misc. 730.

124 Thompson v. Erie Ry. Co., 9 Abb. Pr., N. S., 233.

125 Knowlton v. Bowrason, 8 Cow. 135.

126 Bolles v. Duff, 56 Barb. 567.

127 Field v. Field, 2 Redf. Surr. 160.

128 Valleau v. Cahill, 1 City Ct. R. 47.

form though it may also be based on matters of substance. Oftentimes a motion and an appeal are alternative remedies. An order which is irregular may be set aside upon motion, or on appeal from an order denying a motion to set it aside. The party aggrieved by the irregularity is not confined to appealing from the original order.[129] Objections to ex parte orders must usually be taken by a motion to modify or vacate, as in most cases they are not appealable. For example, to get rid of an order improperly made by a judge at chambers, e. g. an indefinite and continuing stay of proceedings, the proper practice is to move the court to set it aside, not by appeal.[130] The remedy for an order made on notice, on defective proofs, is by appeal and not by motion to vacate.[131] After the circuit at which a motion for a new trial was heard and denied, has ended, it has been held that a motion to vacate the order of denial and rehear the application cannot be made at special term or chambers, but that the remedy is to appeal.[132]

§ 632. Grounds.

The fact that an order was made without jurisdiction and is void, does not give an absolute right to the party against whom the order is made to demand that it be set aside on motion, since it is within the discretion of the court whether to grant such relief or to leave the party to set up the invalidity of the order whenever an attempt be made to enforce it against him, or to obtain any benefit thereunder,[133] and hence the court may refuse to set aside an order as irregular because dated a year in advance, if the time of its date has not arrived, since it is nugatory.[134]

The order may be set aside as irregular with costs, where all the papers used or read on the motion on either side are not specified in the order,[135] or for want of notice to a party en-

129 Pitt v. Davison, 37 Barb. 97.
130 Bank of Genesee v. Spencer, 15 How. Pr. 14.
131 Flaherty v. Flaherty, 5 Month. Law Bul. 74.
132 Mellen v. Mellen, 27 Abb. N. C. 99, 21 Civ. Proc. R. (Browne) 301.
133 People ex rel. Brush v. Brown, 103 N. Y. 684.
134 Smith v. Coe, 30 Super. Ct. (7 Rob.) 477.
135 Rule 3 of General Rules of Practice.

titled to notice. And the order may be revised on appeal because of the failure of plaintiff's affidavits to show reason why a shorter time than eight days is required for the hearing of a motion so as to necessitate an order to show cause,[136] or failure of the affidavits to obtain an order to show cause to state the condition of the action for the next term or circuit at which it could be heard.[137] So, for failure to comply with the rule requiring an ex parte application to contain a statement as to whether any previous application has been made, an order made on such application may be revoked or set aside.[138]

An ex parte order may be vacated ex parte by the judge who made it, on the ground that all the facts were not disclosed on the original application,[139] or on the ground that the order was obtained in violation of a stay of proceedings.[140] On the other hand, the Code provision requiring a judge before whom certain motions are made to render his decision within twenty days after submission, is merely directory, and noncompliance furnishes no ground for vacating the order.[141]

——"Mistake, inadvertence, surprise or excusable neglect." The Code provides that the court may, in its discretion, and on such terms as justice requires, at any time within one year after notice thereof, relieve a party from an order taken against him through his mistake, inadvertence, surprise or excusable neglect.[142] Pursuant to this statute, the test of whether a motion to open an order on the merits should be granted is said to be whether the parties making the motion have shown any material facts not presented to the court upon the previous motion, and if they have, whether they were, so far as matters then existed, prevented from bringing them to the notice of the judge, by "mistake, inadvertence, surprise, or excusable neglect."[143]

136 Proctor v. Soulier, 82 Hun, 353.
137 Proctor v. Soulier, 82 Hun, 353.
138 Rule 25 of General Rules of Practice.
139 Morehouse v. Yeager, 41 Super. Ct. (9 J. & S.) 306.
140 Ward v. Sands, 10 Abb. N. C. 60.
141 Mandamus is the remedy. Hupfel v. Schoemig, 34 Super. Ct. (2 J. & S.) 476.
142 Code Civ. Proc. § 724.
143 Belmont v. Erie Ry. Co., 52 Barb. 637.

§ 633. The motion.

The rules applicable to a motion to vacate an order are those which relate generally to motions, which have already been considered.

—— **Who may move.** An order may be vacated not only upon the application of the defeated party but also on motion of the party in whose favor it was entered.[144]

—— **Time to move.** In regard to the time in which to move to vacate an order, the general rule applicable to all motions that the motion must be made promptly especially where a mere irregularity is the ground, governs, and failure to move for three years has been held laches.[145] The rules relating to the time to make motions, where not specially governed by statute, has already been stated.[146]

—— **Withdrawal of appeal as condition.** If an appeal has been taken, it need not be withdrawn as a condition of the right to move to vacate the order.[147]

Form of ex parte order of court vacating ex parte order of court.

At a special (or general) term, etc.
[Title of cause.]

On reading and filing ———, and on inspecting the order granted by the court in this action on the ——— day of ———, requiring (briefly state contents of order); and on motion of ———,

It is ordered that the said order be and hereby is discharged and vacated.

Enter,

[Initials and title of presiding judge.]

Form of judge's ex parte order vacating ex parte order.

[Title of court and cause.]

On reading and filing ———, I hereby vacate and discharge the order of arrest made by me in this action on the ——— day of ———.

[Date.] [Signature and title of judge.]

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144 Dietz v. Farish, 43 Super. Ct. (11 J. & S.) 87.
Who may make motions in general, see ante, § 554.
145 Gail v. Gail, 58 App. Div. 97.
146 Ante, § 593.
147 Belmont v. Erie Ry. Co., 52 Barb. 637.

§ 634. Effect of vacation.

Where an irregular order has been vacated, it is held to be the same as though it never existed, and for that reason to afford no protection to acts which may have been performed under it.[148]

(D) RENEWAL OF MOTION AND REHEARING.

§ 635. Renewal as dependent on leave of court.

The general rule is that a motion once denied at a special term cannot be renewed at a special term, unless by the terms of the order it appears that the motion was denied on some technical reason not affecting the merits, or leave is granted to renew the motion,[149] and the rule is not affected by the fact that the new motion is based on additional papers,[150] or the fact that the grounds are different, the relief sought being the same,[151] and hence a motion to vacate an order on the merits cannot be made without leave after the denial of a motion to vacate the same order because of technical defects.[152] So where a defendant has made a motion for a bill of particulars as to any part of the complaint, and such motion has been denied, the party cannot make another motion in reference to a bill of particulars as to another part of the same complaint, without leave of the court. The mere fact that different causes of action are set out in the complaint does not entitle the party to make separate

148 Farnsworth v. Western Union Telegraph Co., 25 State Rep. 393; Chapman v. Dyett, 11 Wend. 31; Deyo v. Van Valkenburgh, 5 Hill, 242; Simpson v. Hornbeck, 3 Lans. 53.

149 Noonan v. New York, L. E. & W. R. Co., 68 Hun, 387; Jay v. De Groot, 2 Hun, 205; Dunn v. Meserole, 5 Daly, 434; Talcott v. Burnstine, 13 State Rep. 552; Melville v. Matthewson, 49 Super. Ct. (17 J. & S.) 388; Hoffman v. Livingston, 1 Johns. Ch. 211; Harker v. McBride, 1 How. Pr. 108; Pike v. Power, 1 How. Pr. 164; Dodd v. Astor, 2 Barb. Ch. 395; Bellinger v. Martindale, 8 How. Pr. 113; Allen v. Gibbs, 12 Wend. 202; Dollfus v. Frosch, 5 Hill, 493.

150 Worman v. Frankish, 32 State Rep. 235; Sheehan v. Carvalho, 12 App. Div. 430, 76 State Rep. 222; Williams v. Huber, 5 Misc. 488.

151 Sheehan v. Carvalho, 12 App. Div. 430, 76 State Rep. 222; Lovell v. Martin, 21 How. Pr. 238; Pattison v. Bacon, 12 Abb. Pr. 142.

152 Sheehan v. Carvalho, 12 App. Div. 430, 76 State Rep. 222.

and distinct motions in reference to each portion of the complaint relating to the different causes of action.[153] As to the last proposition, there is, however, authority to the contrary as it has been held that the rule does not apply "to a case where the party proceeds in the second motion upon a different property interest and right from that involved in the first motion," and that hence the denial of a motion to vacate an attachment on one ground does not preclude a second motion to vacate the same attachment on an entirely distinct ground.[154]

An exception to the rule requiring leave to renew is that where new and different facts have arisen a motion may be renewed without leave.[155] In other words, if new facts are proven on the second motion, such as would be ground for giving leave to renew, the second motion should be heard.[156] The "new matter," however, which will alone justify the renewal of a motion without leave must be something which has happened, or for the first time come to the knowledge of the party, since the former decision.[157] Additional or cumulative evidence is not enough.[158]

A motion to vacate a second execution after a denial of a motion to vacate the first execution which was reversed on appeal, is not a renewal of the old motion so that leave of court is necessary,[159] and the rule that a motion cannot be renewed on the same facts, without leave, does not, however, apply to the case of an application to the discretion of the court to allow bail to surrender as matter of favor, upon excuse for delay, after an application for exoneration as matter of right has been denied on the ground that the strict time had passed.[160]

Furthermore, an application based on section 724 of the Code,

153 Klumpp v. Gardner, 44 Hun, 515.

154 Steuben County Bank v. Alberger, 83 N. Y. 274.

155 Noonan v. New York, L. E. & W. R. Co., 68 Hun, 387; Smith v. Zalinski, 94 N. Y. 519, 524; Goddard v. Stiles, 99 N. Y. 640; Erie Ry. Co. v. Ramsey, 57 Barb. 449; German Exch. Bank v. Kroder, 14 Misc. 179, 69 State Rep. 810, 35 N. Y. Supp. 380.

156 Butts v. Burnett, 6 Abb. Pr., N. S., 302.

157 Willet v. Fayerweather, 1 Barb. 72.

158 Ray v. Connor, 3 Edw. Ch. 478.

159 Goddard v. Stiles, 99 N. Y. 640.

160 Hall v. Emmons, 9 Abb. Pr., N. S., 370.

to be relieved from an order because taken through the applicants' "mistake, inadvertence, surprise or excusable neglect," is not, an application for a rehearing of a motion so as to require leave to make.[161]

—— **Order by default.** The denial of a motion by the default of the moving party, if the default be sufficiently excused, is no bar to its renewal.[162]

§ 636. Renewal by successful party.

Sometimes a party whose motion has been granted on terms with which he has not complied, may move for the same relief at a later stage of the cause, without obtaining leave, it having been held that a defendant may move upon his answer for a discharge of a ne exeat, although before answer he had obtained an order for its discharge upon terms which he never complied with.[163] It would seem, though, that ordinarily leave is required in such cases where the facts are the same.

§ 637. Leave to renew—Power of court.

The rule which works an estoppel in favor of a judgment does not fully apply to an order, inasmuch as an order may be subsequently opened on motion and reheard on additional facts being shown, or the court may reconsider its decision,[164] but an order should not be disregarded when the court is called on to pass on substantially the same question at another time in the same action,[165] and it has been held that a subsequent motion is barred where the points made therein might and should have

161 Matter of Blackwell, 48 App. Div. 230.

162 Bowman v. Sheldon, 7 Super. Ct. (5 Sandf.) 657, 10 N. Y. Leg. Obs. 339.

163 Evans v. Van Hall, Clarke, 22.

164 Easton v. Pickersgill, 75 N. Y. 599; Veeder v. Baker, 83 N. Y. 156; Dwight v. St. John, 25 N. Y. 203; Matter of Gall's Estate, 40 App. Div. 114; Dutton v. Smith, 10 App. Div. 566; New York & N. J. Telephone Co. v. Metropolitan Telephone & Telegraph Co., 81 Hun, 453. See, also, 6 Abb. Cyc. Dig. 902 et seq.; First Nat. Bank of Union Mills v. Clark, 42 Hun, 90; White v. Munroe, 33 Barb. 654; Belmont v. Erie Ry. Co., 52 Barb. 637.

165 Dawson v. Parsons, 16 Misc. 190.

been made in a prior motion.[166] An order is not conclusive of matters not specifically, or by necessary implication, adjudicated by it,[167] and a person having no notice of a motion is ordinarily not bound by it.[168]

A leading case in New York in regard to the rule of res judicata as applied to orders is that of Belmont v. Erie Railway Company,[169] in which Judge Cardozo exhaustively discussed the question and reviewed the authorities, and reiterated the rule that at common law, and at present, the right of the court to re-hear discretionary motions is absolute.[170]

The consent of plaintiffs to a re-settlement of an order and the receiving of costs awarded therein and excepting to the sufficiency of sureties required by the order, does not preclude the right to a reargument of the motion.[171]

—— **Discretion of court.** The rule requiring leave to be obtained before renewing a motion is one of practice merely, and does not affect the power of the court to reconsider its decision on a motion upon additional facts, though a renewal cannot be made on additional facts unless the court permits.[172] It is in the court's discretion to hear a renewed motion, although leave to renew has not been obtained,[173] on the same facts and papers on which the previous motion was denied,[174] or upon the original papers with further papers supplied and served for that purpose.[175] If a renewal is allowed on the same papers, it amounts to nothing more than a reargument

166 Matter of Bernheimer, 47 Hun, 567; National Bank of Port Jervis v. Hansee, 15 Abb. N. C. 488.

167 Andrews v. Cross, 17 Abb. N. C. 92.

168 Grauer v. Grauer, 2 Misc. 98.

169 Belmont v. Erie Ry. Co., 52 Barb. 657.

170 Lanahan v. Drew, 44 State Rep. 769, 17 N. Y. Supp. 840.

171 Lanahan v. Drew, 44 State Rep. 769, 17 N. Y. Supp. 840.

172 Riggs v. Pursell, 74 N. Y. 370; Matter of Townshend, 46 State Rep. 135, 18 N. Y. Supp. 905.

173 Thayer v. Parr, 13 Wkly. Dig. 137; White v. Munroe, 33 Barb. 654; Belmont v. Erie Ry. Co., 52 Barb. 637, 642.

174 Holmes v. Rogers, 18 State Rep. 652; Arnold v. Oliver, 64 How. Pr. 452; White v. Munroe, 33 Barb. 654; Belmont v. Erie Ry. Co., 52 Barb. 637, 642.

175 Arnold v. Oliver, 64 How. Pr. 452; White v. Munroe, 33 Barb. 650; Smith v. Spalding, 30 How. Pr. 339.

which is ordinarily granted where the judge perceives that his former ruling was due to oversight, misapprehension or mistake,[176] but which will not be granted unless it appears that there is some decision or some principle of law which would have a controlling effect, and which has been overlooked, or that there has been a misapprehension of facts, and even in these cases it will rarely be granted when there is a remedy by appeal.[177] And leave to reargue will not be granted after the time to appeal from the decision has expired, merely because of an error of law disclosed for the first time by a subsequent decision of the court of appeals.[178] Leave to renew a motion should be granted where the defect which controls the ultimate decision on the former motion is cured and the case stands on a fuller statement of facts, especially where the ground on which the order was reversed in the appellate court was not urged in the lower court.[179]

A motion to rehear may be heard anew in the court's discretion irrespective of whether the party who made the motion or the party moved against, asks the favor.[180]

—— **Proceedings to obtain.** If a party desires to renew a motion, he should apply by motion to the judge who denied the motion, though it has been held that the application may be to another judge of the same court.[181] The notice of motion should be accompanied by affidavits showing the grounds on which the right to a renewal is based. It is common to give notice of an application for leave to renew, and in the same notice to give notice of renewing the motion conditionally, in case such leave be granted. So on an order to show cause why leave should not be given to renew a prior motion, the motion to renew may be made instanter, without notice, on leave being granted, if no objection be made.[182] In such a case, it depends very much upon the discretion of the special

176 Matter of Crane, 81 Hun, 96.
177 Bolles v. Duff, 56 Barb. 567.
178 Klipstein v. Marchmedt, 81 N. Y. Supp. 317.
179 Adams v. Bush, 2 Abb. Pr., N. S., 112.
180 Belmont v. Erie Ry. Co., 52 Barb. 637, 642.
181 Belmont v. Erie Ry. Co., 52 Barb. 637.
182 Fowler v. Huber, 30 Super. Ct. (7 Rob.) 52.

term whether both branches of the motion shall be heard together. Usually they are heard together and disposed of under one order.[183] Upon a motion for leave to renew a motion, the merits of the main application are not to be investigated or determined.[184]

——**Manner of granting.** A renewal may be granted (1) by a clause in the original order permitting a renewal which clause is usually inserted where the denial is because of technical defects,[185] or (2) by an order granted on a motion for leave to renew, or (3) by hearing the renewal of the motion which has the same effect as a formal leave to renew.[186] However, a mere statement of the judge on the hearing of a motion based on technical defects that an independent motion could be made on the merits, does not constitute leave to renew the first motion or to make another motion.[187]

——**Effect.** An order allowing a motion to be renewed, granted before the expiration of the time within which the original motion was required to be made does not, in the absence of any special provision therein, extend the time for making the motion, and hence where the renewed motion is not made within the statutory time for the original motion, it will be denied.[188]

§ 638. Facts to be shown on renewal.

If an order contains leave to renew the motion on the performance of certain acts, a second motion must be based on proof that such conditions have been complied with, or it will be denied.[189]

§ 639. Appeal and renewal of motion as concurrent remedies.

The fact that an appeal is pending is not a bar to an appli-

183 Andrews v. Cross, 17 Abb. N. C. 92.
184 Crocker v. Crocker, Sheld. 274.
185 Devlin v. Hope, 16 Abb. Pr. 314; Mitchell v. Allen, 12 Wend. 290. So a denial of a motion "without prejudice" is in effect a granting of leave to renew.
186 Harris v. Brown, 93 N. Y. 390.
187 Sheehan v. Carvalho, 12 App. Div. 430.
188 Wheeler v. Brady, 2 Hun, 347.
189 Wetmore v. Wetmore, 29 App. Div. 512.

cation to renew a motion,[190] but the affirmance on appeal of the original order precludes a motion for renewal,[191] and the granting of leave to renew precludes an appeal from the original order.[192] So, by appealing from an order, the appellant waives leave reserved to him to renew the motion which the order denied.[193]

§ 640. Effect of failure to obtain leave.

That leave to renew was not obtained does not require a denial of the second motion, especially where new facts are proven,[194] nor does it render the second order void as distinguished from voidable. It has been held, however, that failure to obtain leave to renew, is ground for reversal of the order.[195] It is submitted, however, that where a motion is renewed before the same judge, the failure to obtain leave is in no case ground for reversal, and this contention is supported by the court of appeals which has said in reference thereto that although no formal leave was granted to renew, yet the granting of the order to show cause, and the hearing of the motion on additional affidavits, was in fact granting leave to renew the motion, and a renewal of the same.[196]

190 First Nat. Bank of Union Mills v. Clark, 42 Hun, 90; Belmont v. Erie Ry. Co., 52 Barb. 637.

191 Dodd v. Astor, 2 Barb. Ch. 395.

192 Robbins v. Ferris, 5 Hun, 286.

193 Peel v. Elliott, 16 How. Pr. 483.

194 Butts v. Burnett, 6 Abb. Pr., N. S., 302.

195 Hall v. Emmons, 32 Super. Ct. (2 Sweeny) 396; Melville v. Matthewson, 49 Super. Ct. (17 J. & S.) 388; Chamberlain v. Dumville, 50 State Rep. 356, 21 N. Y. Supp. 827.

196 Harris v. Brown, 93 N. Y. 390.

CHAPTER IV.

NOTICES AND PAPERS.

§ 641. Necessity of notice.

The old Code provided that where notice of appearance was given, notice of all the ordinary proceedings in the action must be served on the party or his attorney,[1] and it was held thereunder that provisional remedies were not "ordinary proceedings," within the sense of the term as used in the Code section, and that therefore though a defendant had appeared, he was not entitled to notice of an application for an order to arrest him, or to notice of an application for an injunction before answer.[2] The present Code merely provides that where a party has appeared, a notice or other paper, "required to be served in an action," must be served on his attorney.[3] The necessity of serving notice in particular cases is governed by special Code provisions.

§ 642. Written or oral.

A notice required in a legal proceeding should be in writing,[4] except where given in the presence and hearing of the

[1] Code Pro. § 414.
[2] Becker v. Hager, 8 How. Pr. 68.
[3] Code Civ. Proc. § 799.
[4] Bissell v. New York Cent. & H. R. R. Co., 67 Barb. 385, 391; Gil-

court or referee, while the trial is in progress, from day to day.[5] So where a statute requires notice to be given as the basis of a forfeiture of some right or interest, it means a notice in writing, in the absence of some provision in the statute prescribing a method of giving the notice in some other way.[6]

§ 643. Personal notice.

When the law requires a notice to be given and does not prescribe the mode of service, it must, as a rule, be served personally.[7] But the context or the circumstances of the case may be such as to show that a personal notice was not intended, and in such a case a notice by mail is authorized.[8] Service of written notice, required by statute to be made upon a corporation, made upon a person in charge of its business office, and who answered the calls upon it over the telephone, has been held sufficient.[9] When a notice is required to be given to a board or body, service of such notice upon the clerk or chairman thereof is sufficient.[10]

§ 644. Form and requisites.

Rule 19 of the general rules of practice provides as follows: "Every pleading, deposition, affidavit, case, bill, exceptions, report, paper, order or judgment exceeding two folios in length, shall be distinctly numbered and marked at each folio in the margin thereof, and all copies, either for the parties or the

bert v. Columbia Turnpike Co., 3 Johns. Cas. 107; Matter of Cooper, 15 Johns. 533; Jenkins v. Wild, 14 Wend. 539; People ex rel. Gemmill v. Eldridge, 7 How. Pr. 108; Rathbun v. Acker, 18 Barb. 393; Lane v. Cary, 19 Barb. 537; McDermott v. Board of Police, 25 Barb. 635, 5 Abb. Pr. 422; Pearson v. Lovejoy, 53 Barb. 407, 35 How. Pr. 193.

[5] Kerr v. McGuire, 28 N. Y. 446.

[6] Erving v. City of New York, 131 N. Y. 133.

[7] People ex rel. Williams v. Hulburt, 5 How. Pr. 446, 9 N. Y. Leg. Obs. 245, Code R., N. S., 75; Rathbun v. Acker, 18 Barb. 393; McDermott v. Board of Police, 5 Abb. Pr. 422, 25 Barb. 635; People ex rel. Stephens v. Greenwood Lake Ass'n, 44 State Rep. 914; Mitchell v. Clary, 20 Misc. 595.

[8] Beakes v. De Cunha, 126 N. Y. 293.

[9] Jones v. Rochester Gas & Electric Co., 7 App. Div. 465.

[10] L. 1892, c. 677, § 20.

court, shall be numbered or marked in the margin, so as to conform to the original draft or entry and to each other, and shall be indorsed with the title of the cause.[11] All the pleadings and other proceedings and copies thereof, shall be fairly and legibly written or printed, and if not so written or printed and folioed, and indorsed as aforesaid the clerk shall not file the same, nor will the court hear any motion or application founded thereon. All pleadings or other papers in an action or special proceeding served on a party or an attorney, or filed with the clerk of the court, must comply with section 796 of the Code and must be written or printed in black characters, and no clerk of the court shall file or enter the same in his office unless it complies with this rule. The party upon whom the paper is served shall be deemed to have waived the objection for non-compliance with this rule unless within twenty-four hours after the receipt thereof he returns such papers to the party serving the same with a statement of the particular objection to its receipt, but this waiver shall not apply to papers required to be filed or delivered to the court.[12] It shall be the duty of the attorney by whom the copy pleadings shall be furnished for the use of a court on trial, to plainly designate on each pleading the part or parts thereof claimed to be admitted or controverted by the succeeding pleadings."

Section 796 of the Code provides that all papers served or required to be filed in an action, must be plainly and legibly written or printed in black ink upon durable paper of good material, and, if imprinted by typewriter, such paper must be of linen quality equal in weight to sixteen pounds to the double cap ream, of seventeen by twenty-eight inches in size.[13]

§ 645. Sufficiency.

The sufficiency of a notice, where its terms are not expressly

[11] A folio is one hundred words, counting as a word each figure necessarily used. L. 1892, c. 677, § 11.

[12] In New York City Baptist Mission Soc. v. Tabernacle Baptist Church, 9 App. Div. 527, it was held that the failure to follo a judgment did not render it void or prevent its entry by the clerk, and that the remedy was to move to set aside the judgment and to return the copy served to limit the time to appeal.

[13] Code Civ. Proc. § 796.

prescribed by statute, would seem to depend on whether it clearly conveys its meaning to the person or party to whom addressed.[14] The failure to insert in the address of a notice the names of all the partners in the firm of attorneys on whom the notice was served, does not render the notice insufficient, where it was served at the proper office and delivered to the proper attorney and was retained, no one being prejudiced by the omission.[15]

§ 646. Indorsement or subscription of papers.

Rule 2 of the general rules of practice provides that all papers served or filed must be indorsed or subscribed with the name of the attorney or attorneys, or the name of the party if he appears in person, and his or their office address, or place of business.[16] This rule is complied with, however, where a notice of entry of judgment is signed by the plaintiff's attorneys and the notice is indorsed on the copy judgment served therewith, and the whole paper is indorsed with the names of the plaintiff's attorneys and their office address, since the rule does not require that the office address be stated more than once on the same paper or set of papers.[17] So the rule is sufficiently complied with, in the case of a notice of entry of a decree, where the name of the attorney subscribed to the notice is followed by an address, which is, in fact, his office, although not in terms described as an office address or place of busi-

[14] See Fire Department v. Buffum, 2 E. D. Smith, 511.

[15] Falker v. New York, W. S. & B. Ry. Co., 100 N. Y. 86.

[16] Rule 2 of General Rules of Practice.

[17] Falker v. New York, W. S. & B. Ry. Co., 100 N. Y. 86; People ex rel. Wallkill Valley R. Co. v. Keator, 101 N. Y. 610.

An answer subscribed by the defendant's attorney, and indorsed on the back after it was folded, with the title of the action, the name and address of the defendant's attorney, and immediately thereunder a notice of appearance also subscribed by the defendant's attorney, but to which his address was not added, was sufficient, as it was not necessary to add the address to the signature appended to the notice, as such address immediately preceded the notice and was sufficient to give the plaintiff's attorney information as to the facts. German American Bank v. Champlin, 11 Civ. Proc. R. (Browne) 452.

ness.[18] The signature need not be written, but may be printed.[19]

—— **Effect of failure to indorse or of improper indorsement.** An unsigned notice is of no effect,[20] but the omission to indorse upon papers served or filed, the post-office address or place of business, of the attorney serving them, is a mere irregularity and does not necessarily vitiate either the paper or its service,[21] except that a notice of entry of judgment not indorsed or subscribed with the attorney's name and his address, is ineffectual to limit the right of appeal.[22] Such omission entitles the party served either to return the paper or to move to set it aside, but he cannot, after receiving it without objection, safely disregard the office which the paper is designed to fill.[23]

§ 647. Filing of papers.

In cases pending in the appellate division, the papers must be filed with the clerk of such division of the department in which the case is pending. In all other cases where no provision is made by the Code, papers in the supreme court must be filed with the clerk of the county designated in the complaint as the place of trial. In courts of record other than the supreme court, the papers must be filed in the office of the respective clerks thereof. A return or other paper in a special proceeding, where no other disposition thereof is prescribed by law, must be filed, with the clerk of the county in which the special proceeding is taken, if it is before a county officer, or a judge of a court established in a city; if before a justice of the supreme court, with the clerk of a county designated by the justice; or, if no designation is made by him, of a county where one of the parties resides.[24] In case the place of trial

[18] De Lamater v. Havens, 5 Dem. Surr. 53.

[19] Smith v. Kerr, 15 Civ. Proc. R. (Browne) 126, 49 Hun, 29, 17 State Rep. 351, 28 Wkly. Dig. 516.

[20] Demelt v. Leonard, 19 How. Pr. 182.

[21] Evans v. Backer, 101 N. Y. 289; Clapp v. Graves, 26 N. Y. 418.

[22] Kelly v. Sheehan, 76 N. Y. 325; Yorks v. Peck, 17 How. Pr. 192.

[23] Evans v. Backer, 101 N. Y. 289; Patterson v. McCunn, 38 Hun, 531.

[24] Code Civ. Proc. § 825. This provision applies to supplementary proceedings. Fiske v. Twigg, 5 Civ. Proc. R. (Browne) 41. See, also, Renner v. Meyer, 22 Abb. N. C. 438.

is changed, all subsequent papers must be filed in the county to which the change is made.[25] The filing must be during office hours. If filed after office hours, it does not become effectual until the next day.[26] The fact that a clerk takes the paper into his hands and immediately refuses to file it, and tenders it back to the party offering it, constitutes no filing.[27] Where an original pleading or paper is lost or withheld by any person, the court may authorize a copy to be filed and used instead of the original.[28]

§ 648. Publication of notices.

Where a notice, or other proceeding, is required by law to be published in a newspaper published in a county, and no newspaper is published therein, or to be published oftener than any newspaper is regularly published therein, the publication may be made in a newspaper of an adjoining county, except where special provision is otherwise made by law.[29] Publication of notice is sufficient which appears to have been made in the paper intended by the order, notwithstanding the variance in the name of the paper,[30] and proof that a notice was "published in the New York Day Book," is sufficient to show compliance with an order of court that it be published in "the newspaper published in the city of New York, entitled 'the Evening Day Book,'" in the absence of any evidence of the existence of two papers with the title of Day Book.[31] A notice required to be published "each day for a week," need

[25] Rule 2 of General Rules of Practice. Filing of motion papers, see post, § 647. Filing of summons and pleadings, see Code Civ. Proc. § 824.

[26] Hathaway v. Howell, 54 N. Y. 97.

See, also, Wardell v. Mason, 10 Wend. 573; France v. Hamilton, 26 How. Pr. 180.

[27] Cushman v. Hadfield, 15 Abb. Pr., N. S., 109.

[28] Code Civ. Proc. § 726.

[29] Code Civ. Proc. § 826.

A paper is not published in the place where part of the issue is mailed and distributed, where it is printed in an adjoining town. Village of Tonawanda v. Price, 171 N. Y. 415.

[30] Candee v. Hayward, 37 N. Y. 653.

[31] Soule v. Chase, 24 Super. Ct. (1 Rob.) 222, 1 Abb. Pr., N. S., 48.

not be published on Sunday.[32] A statute requiring a notice to be published for six weeks successively, means during forty-two days. An affidavit that it was published once in each week for six weeks successively, is insufficient, for it may be literally true, and yet only thirty days' notice have been given.[33] But where a weekly publication of a notice is required, it is not necessary to show publication on the same day of each week.[34]

The Code provides that where an action is brought for the collective benefit of the creditors of a person, or of an estate, or for the benefit of a person or persons, other than the plaintiff, who will come in and contribute to the expense of the action, notice of a direction of the court, contained in a judgment or order, requiring the creditors, or other person or persons to exhibit their demands, or otherwise to come in, must be published, once in each week, for at least three successive weeks, and as much longer as the court directs, in the newspaper, published at Albany, in which legal notices are required to be published, and in a newspaper, published in the county where the act is required to be done.[35] This provision does not, however, apply unless the action is expressly brought for the benefit or in behalf of others, and hence does not apply to an action by a surety on a bond given by an assignee for the benefit of creditors, brought in the name of the surety, but not stating that it was for the benefit of others.[36] Where such a notice is published, all of the creditors are concluded by the judgment as effectually as if named as a party, whether or not they appear or have actual notice,[37] but it seems that on excuse being shown, a creditor may be allowed to come in and prove his claim after the day fixed.[38]

[32] Matter of Excelsior Fire Ins. Co., 16 Abb. Pr. 8, 38 Barb. 297.

[33] People ex rel. Meech v. Yates Common Pleas, 1 Wend. 90; followed Bunce v. Reed, 16 Barb. 347. See, also, People ex rel. Demarest v. Gray, 10 Abb. Pr. 468, 19 How. Pr. 238.

[34] Wood v. Knapp, 100 N. Y. 109; Steinle v. Bell, 12 Abb. Pr., N. S., 171.

[35] Code Civ. Proc. § 786.

[36] Schuehle v. Reiman, 86 N. Y. 270.

[37] Kerr v. Blodgett, 48 N. Y. 62.

[38] Downey v. May, 8 State Rep. 481, 19 Abb. N. C. 177.

CHAPTER V.

SERVICE OF PAPERS.

§ 649. Scope of chapter.

Article 3 of title 6 of chapter 8 of the Code contains the rules applicable to the service of papers other than a sum-

mons or other process, or a paper to bring a party into contempt, except when the mode of service is specially prescribed by law.[1] The article applies, inter alia, to service of pleadings, orders, and judgments. It is intended to cover the same ground covered by such Code rules.

§ 650. Mode of service in general.

Service of papers in an action is usually made by delivery of copies, retaining or filing the originals.[2] The copy need not be certified unless expressly required by the statutes or rules of practice. A variance in the copy served is not ground of objection, if the party served cannot be misled or prejudiced by the mistake.[3]

A sheriff or jailer on whom a paper in an action or special proceeding directed to a prisoner in his custody is lawfully served, or to whom such a paper is delivered for a prisoner, must within two days thereafter deliver it to the prisoner with a note thereon of the time of the service or of the receipt thereof by him, under penalty of being liable to the prisoner for all damages occasioned by the failure so to do.[4] Subject to reasonable regulations which the sheriff may establish for that purpose, a sheriff, jailer or other officer who has the custody of a prisoner must permit such access to him as is necessary for the personal service of a paper in an action or special proceeding to which the prisoner is a party and which must be personally served.[5]

§ 651. Conditional service.

A conditional service of notice is inoperative unless there is a performance of the condition.[6]

[1] Code Civ. Proc. §§ 796-802.

[2] Smith v. Kerr, 15 Civ. Proc. R. (Browne) 126, 49 Hun, 29, 17 State Rep. 351, 28 Weekly Dig. 516.

[3] Union Furnace Co. v. Shepherd, 2 Hill, 413.

[4] Code Civ. Proc. § 131.

[5] Code Civ. Proc. § 132.

[6] Bronk v. Conklin, 2 How. Pr. 7.

§ 652. Necessity of personal service.

Service of papers in an action may be either personal or otherwise,[7] but when a statute requires service on a person, it means personal service, unless some other service is specified or indicated.[8] Punishment for failure to obey an order cannot ordinarily be inflicted unless the order is personally served, yet the court may punish, notwithstanding the order was served only on the attorney for the party, where the party appears on the motion to punish and contest the matter on the merits.[9]

§ 653. Service on party or on attorney.

Papers must be served on the attorney rather than on the party after an appearance has been entered.[10] For example, an amended complaint is to be served on the attorney who has appeared for defendant, rather than on the defendant,[11] and an order that defendant allow plaintiff or his attorney to inspect their books or show cause, at a time and place specified in the order, is properly served on the attorney, rather than on the defendant.[12]

In the chapter on attorneys, we have considered the effect of obtaining judgment as severing the relation of attorney and client, and therefore precluding a proper service of papers on the attorney after judgment. Suffice it to state at this time that motion papers to set aside a judgment have been held properly served on the attorneys for the successful party, though made nearly two years after the entry of judgment and after the attorneys had settled with their client and dissolved partnership,[13] and that service of motion papers by defendant's attorney to set aside an attachment and an order for publica-

[7] Code Civ. Proc. § 796.

[8] Rathbun v. Acker, 18 Barb. 393.

[9] Brown v. Georgi, 26 Misc. 128.

[10] Code Civ. Proc. § 799; Purvis v. Gray, 39 How. Pr. 1. This includes notice of a motion. Bennett v. Weed, 38 Misc. 290.

[11] Tripp v. De Bow, 5 How. Pr. 114; Mercier v. Pearlstone, 7 Abb. Pr. 325.

[12] Rossner v. New York Museum Ass'n, 20 Hun, 182.

[13] Miller v. Miller, 37 How. Pr. 1.

tion made on plaintiff's attorney about four years after the entry of judgment in the action has been held sufficient.[14]

§ 654. Necessity of service on a defendant who has not appeared.

Service of a notice or other paper, in the ordinary proceedings in the action, need not be made on a defendant who has not appeared, unless he is actually confined in jail for want of bail.[15]

§ 655. Service on party.

Service of papers may be made on a party by leaving the paper at his residence within the state between six o'clock in the morning and nine o'clock in the evening with a person of suitable age and discretion.[16] In every case of service on a party, except to bring him into contempt, leaving the paper at his dwelling house is sufficient.[17]

§ 656. Service on attorney.

If an attorney is in his office, papers may be served on him individually, or it has been held, they may be served on his clerk although the attorney is in the office,[18] and service on an attorney or his clerk in his office, though at ten o'clock at night, is good.[19] The effect of a change of attorneys has already been considered in a previous chapter.[20] Service of papers on an attorney in open court is legal, though not to be commended.[21]

—— **On firm of attorneys.** Service of papers on a firm of attorneys, even though the business is done in the name of

[14] Drury v. Russell, 27 How. Pr. 130.

[15] Code Civ. Proc. § 799; Suydam v. Holden, Seld. Notes, 170.

[16] Code Civ. Proc. § 797, subd. 4.

[17] Johnston v. Robins, 3 Johns. 440.

[18] Jackson v. Yale, 1 Cow. 215; Gross v. Clark, 1 Civ. Proc. R. (McCarty) 17. These cases are of doubtful authority, however.

[19] Cooper v. Carr, 8 Johns. 279.

[20] Ante, §§ 319-335.

[21] National Press Intelligence Co. v. Brooke, 18 Misc. 373.

one, may be on either, whether or not in his office,[22] but where the firm is dissolved and the attorney of record leaves the state, but does not become a nonresident, service must still be made on him and not on his former partner.[23] Service of notice of trial on a surviving attorney after the death of his partner is regular.[24]

—— **On non-resident attorney.** Service of a paper on a resident of an adjoining state who practices law in this state may be made on him, where he might be served at his residence if he resided within the state, by depositing the paper in a post-office in the city or town where his office is located, properly inclosed in a postpaid wrapper directed to him at his office. A service thus made is equivalent to personal service on him.[25]

—— **During absence of attorney but when person is in charge of office.** Service on an attorney during his absence from his office may be made by leaving the paper with his partner or clerk therein or with a person having charge thereof.[26] Merely leaving the paper in the attorney's office is insufficient, unless no one is in the office.[27] The paper must be left with a partner, a clerk, or a person "having charge" of the office. Hence, service of notice on a person, or a member of the attorney's family, in his office, instead of on a clerk in the office, is insufficient,[28] especially where the receipt of the paper is denied and no reason shown for want of better service,[29] though service of notice on the attorney's brother in the office of the attorney, has been held sufficient where the party also had notice.[30] An attorney who has a common entrance to his of-

22 Lansing v. McKillup, 7 Cow. 416.

Although the present Code does not expressly authorize service of an attorney out of his office, no reason is apparent why such a service is not a good one, especially where the attorney does not object.

23 Diefendorf v. House, 9 How. Pr. 243.

24 Saxton v. Dodge, 46 How. Pr. 467.

25 Code Civ. Proc. § 60.

26 Code Civ. Proc. § 797, subd. 2.

27 Jackson v. Gardner, 2 Caines, 95, Col. & C. Cas. 359; Campbell v. Spencer, 1 How. Pr. 97.

28 Anonymous, 1 Caines, 73.

29 Salter v. Bridgen, 1 Johns. Cas. 244.

30 Wardell v. Eden, 2 Johns. Cas. 121, Col. & C. Cas. 137.

fice, with another attorney, may be said to be in "charge of the office" of the other.[31]

—— **During absence of attorney and when no person is in charge of office.** If the office is open but no one is in the office in charge thereof, service may be made between six a. m. and nine p. m. by leaving the papers in a conspicuous place in the office,[32] and such a service is good although the attorney does not receive them.[33] Service in a "conspicuous place" can be made only when the office door is unlocked,[34] though the special term of the New York city court has held that service in a conspicuous place is made by dropping the paper through a slit or opening for letters in the door of the attorney's office, into a receptacle attached to such door on the inside for receiving letters during the attorney's absence, although the paper is not inclosed in a sealed wrapper, on the ground that such a receptacle must be deemed a "conspicuous place" in the office.[35] This decision, however, has been overruled by the supreme court which holds that where the office is closed, the depositing of papers through a slit in the door, is insufficient.[36]

Service may also be made during such hours by depositing the papers in the office letter box, enclosed in a sealed wrapper, directed to the attorney.[37] The term "office letter box" refers to the attorney's letter box in the building outside of the attorney's office.[38]

A paper cannot be properly served upon an attorney at his office, in his absence, and when no one is present and the door is locked, either by throwing it through the transom,[39] push-

[31] Crook v. Crook, 14 Daly, 298, 12 State Rep. 663, 27 Weekly Dig. 357.

[32] Code Civ. Proc. § 797, subd. 3.

[33] Corn Exch. Bank of Chicago v. Blye, 9 State Rep. 67.

[34] Anonymous, 18 Wend. 578; Haight v. Moore, 36 Super. Ct. (4 J. & S.) 294.

[35] Duval v. Busch, 21 Abb. N. C. 214, 13 Civ. Proc. R. (Browne) 366, 13 State Rep. 752.

[36] Livingston v. New York El. R. Co., 58 Hun, 131. Followed by Timolat v. S. J. Held Co., 15 Misc. 630, 72 State Rep. 800.

[37] Code Civ. Proc. § 797, subd. 3.

[38] Duval v. Busch, 13 State Rep. 752, 13 Civ. Proc. R. (Browne) 366, 21 Abb. N. C. 214.

[39] Haight v. Moore, 36 Super. Ct. (4 J. & S.) 294.

There is dicta, however, that this mode of service is sufficient if the

ing it under the door,[40] or by procuring a key to unlock the door and putting it in a conspicuous place.[41] It follows that service by affixing the paper to the office door of an attorney, between seven and eight o'clock in the morning, when no one is in the office, is insufficient.[42]

—— **At attorney's residence.** If between six a. m. and nine p. m. the office is not open so as to admit of leaving the paper therein, and there is no office letter-box, the papers may be left at the residence of the attorney within the state with a person of suitable age and discretion.[43] Where an attorney resides in one place and has an office for the transaction of business in another place and issues papers without adding any place to his name as his residence, the opposing attorney desiring to serve papers on him may, where his office is closed, either follow him to his residence or serve the papers on him by mail by directing them according to the best information which can reasonably be obtained.[44] So where the attorney, by designating his address, has fixed the place for service, a party having attempted to make service there within the hours prescribed by law, unsuccessfully, is not bound to send to another town to serve them at the attorney's real residence.[45]

§ 657. Service by mail.

By the old practice, service through the post office was not good service, but if the paper was actually received in time by the person to whom it was sent, it was held good as of the day

papers afterwards come into the possession of the attorney. Claflin v. Dubois, 14 Civ. Proc. R. (Browne) 290, 15 State Rep. 963.

[40] Corning v. Pray, 2 Wend. 626; Anonymous, 18 Wend. 578.

It seems that such a service is insufficient though the paper is found the next day by a partner and put on the attorney's desk with a note as to where it was found. Rogers v. Rockwood, 20 Civ. Proc. R. (Browne) 212.

[41] Vail v. Lane, 67 Barb. 281, 4 Hun, 653; Campbell v. Spencer, 1 How. Pr. 199; Livingston v. Comstock, 1 How. Pr. 253.

[42] Oshiel v. De Graw, 6 Cow. 63.

[43] Code Civ. Proc. § 797, subd. 3.

[44] Lord v. Vandenburgh, 15 How. Pr. 363.

[45] Lord v. Vandenburgh, 15 How. Pr. 363.

when received.[46] About 1840, a rule of court was adopted which provided that service of papers by mail should be good in all cases where the attorneys resided in different places, between which there was a communication by mail. Under this rule the deposit in the post office, in conformity with the rule, was held to be good service, whether the paper was received or not.[47] The Code of Procedure adopted the language of the rule, with a single modification, requiring that there should be a "regular" communication by mail between the two places.[48] The present Code provides that service of papers by mail may be made on a party or an attorney by depositing the paper, properly enclosed in a postpaid wrapper in the postoffice [or in any postoffice box regularly maintained by the government of the United States and under the care of the postoffice] of the party or the attorney serving it, directed to the person to be served at the address within the state designated by him for that purpose upon the preceding papers in the action, or where he has not made such a designation, at his place of residence or the place where he keeps an office according to the best information which can conveniently be obtained concerning the same.[49] The matter in brackets was added by amendment in 1897,[50] and renders superfluous the further provision that service by mail by depositing in a branch postoffice in the city of New York has the same effect as if the paper was deposited in the general or principal postoffice of that city.[51] Under the present Code, service by mail on an attorney is good, although both attorneys reside in the same town.[52] The service is insufficient where the address omits the street number which appeared on papers previously served in the case by the attorney.[53]

[46] Hudson v. Henry, 1 Caines, 67; Stafford v. Cole, 1 Johns. Cas. 413.

[47] Brown v. Briggs, 1 How. Pr. 152.

[48] Code Pro. § 410; Schenck v. McKie, 4 How. Pr. 246.

Under the old Code, it was held that the papers need not be addressed to the street and street number. Oothout v. Rhinelander, 10 How. Pr. 460. The rule under the present Code is different.

[49] Code Civ. Proc. § 797, subd. 1.

[50] L. 1897, c. 40.

[51] Code Civ. Proc. § 801.

[52] Whitney v. Haggerty, 7 State Rep. 766; Seifert v. Caverly, 63 Hun, 604, 44 State Rep. 472, 18 N. Y. Supp. 327.

[53] Seifert v. Caverly, 63 Hun, 604, 44 State Rep. 472, 18 N. Y. Supp. 327.

A paper proved to have been sent by mail is presumed to have been received, unless the contrary is made to appear,[54] and papers served by mail as directed by the rules of court or the statutes are at the risk of the person to whom the paper is directed.[55]

The fact that the envelope in which the papers are sent contains on the outside a direction to return if not called for within five days, does not make the service conditional or render it defective, unless it is made to appear that by reason of a return in obedience to the direction, the party failed to receive the letter.[56]

Papers served by mail may be used for the purpose of another motion where actually received, though improperly served to effectuate their original purpose.[57]

—— **Place of mailing.** Service of papers by mail can be made only at the place indicated by an attorney as his place of residence for the purposes of the action. If they are mailed at any other place the service is only good from the time the paper is actually received.[58]

—— **Time for mailing.** A paper served by mail may be deposited in the post office at any hour of the day, without regard to the time when the mail goes.[59] In New York city it has been held that a deposit of a paper prior to the last regular tour from the branch office for the collection of the matter contained in the mail-boxes in that district which is made at about midnight, is sufficient.[60]

—— **Prepayment of postage.** Full postage must be paid,[61] or else the attorney to whom the papers are sent need not take them from the post office.[62]

54 Stafford v. Cole, 1 Johns. Cas. 413, Col. & C. Cas. 110.

55 Jacobs v. Hooker, 1 Barb. 71; Schwarz v. Livingston, 46 State Rep. 477, 18 N. Y. Supp. 879.

56 Gaffney v. Bigelow, 2 Abb. N. C. 311.

57 Van Benthuysen v. Stevens, 14 How. Pr. 70.

58 Hurd v. Davis, 13 How. Pr. 57.

59 Elliott v. Kennedy, 26 How. Pr. 422.

See, also, Noble v. Trotter, 4 How. Pr. 322, 3 Code R. 35.

See post, § 659, as to time for service where service is by mail.

60 Vernon v. Gillen Printing Co., 16 Misc. 507.

61 Bross v. Nicholson, 1 How. Pr. 158; Anonymous, 1 Hill, 217.

62 Anonymous, 19 Wend. 87; Woods v. Hartshorn, 2 How. Pr. 71.

§ 658. Service on clerk of court.

Service of a paper on the clerk of the court is allowable (1) where a party to an action, who has appeared in person, resides without the state, or (2) where the residence of a party cannot with reasonable diligence be ascertained and he has not designated an address within the state on the preceding papers.[63] Service of papers on the clerk of the court by mail is effective, however, only from the date of his actually receiving them.[64]

§ 659. Time for service.

The time within which papers must be served is regulated by special statutes relating to the particular papers, and hence will not be treated of at this time except to state a few general rules. It is a general rule that where the party waits and serves a paper on the day when his default for the want of it may be regularly taken, and the default is taken on that day, in good faith, and without knowing of the service, the court will not inquire or take notice of the fact that the service was at an earlier hour in the day than the taking of the default.[65] Where both the office and the dwelling of the attorney are closed on the day the paper is attempted to be served, a regular service on the next day, though after the due time has passed, with notice of the facts, is regular,[66] and service of an order staying proceedings at the office of an attorney after 4 p. m. of the last day for service, in the absence of the attorney, has been held a good service,[67] though it seems that ordinarily where the office is closed on the last day, service should be made at the attorney's residence.[68] Service after the time has passed, on a clerk who accepts the paper in ignorance of the fact that his principal had refused it as too late, is ineffectual.[69]

—— **Service by mail.** Service of papers by mail doubles the

[63] Code Civ. Proc. § 800.
[64] Morris v. Morange, 17 Abb. Pr. 86, 26 How. Pr. 247.
[65] Brainard v. Hanford, 6 Hill, 368.
[66] Falconer v. Ucoppell, 2 Code R. 71.
[67] Troy Carriage Works v. Muxlow, 16 Misc. 561.
[68] Asinari v. Volkening, 2 Abb. N. C. 454.
[69] O'Brien v. Catlin, Code R., N. S., 273.

time within which service must be made and also doubles the time to allow the adverse party, after notice or service, within which to do an act, except that service of notice of trial may be made through the postoffice not less than sixteen days before the day of trial, including the day of service.[70] It has been held in the first and third departments that a service by mail does not double the time within which the person serving must act but only the time of the person served,[71] but the contrary rule is held in later cases in the first department and in the other departments.[71a] When service is made by mail, the time begins to run from the day when it was mailed, and not from the day of receipt.[72] A paper is regularly served by mail if duly mailed on the last day for service,[73] before the close of the mail,[74] though not received until the time for service has expired,[75] but a paper deposited in the post office in a town different from that in which the sending attorney resides, is not a good service, except from the time actually received.[76] It seems that the mailing of a paper on the last day so that it will reach its destination by a mail leaving on that day, or by the first mail of the next day, is sufficient.[77]

§ 660. Service on holidays.

A paper may be served on a day designated as a holiday by

[70] Code Civ. Proc. § 798.

This rule applies to appeals. Dorlon v. Lewis, 7 How. Pr. 132; Evans v. Lichtenstein, 9 Abb. Pr., N. S., 141.

[71] Armstrong v. Phillips, 60 Hun, 243; Ward v. Gillies, 19 Civ. Proc. R. (Browne) 40.

[71a] So held on motion to change place of trial. Binder v. Metropolitan Street Ry. Co., 68 App. Div. 281; Lesser v. Williams, 23 State Rep. 396. Also on service of amended answer. Bates v. Plasmon Co. of America, 41 Misc. 16.

[72] Van Horne v. Montgomery, 5 How. Pr. 238.

[73] Gibson v. Murdock, 1 Code R. 103; Lawler v. Saratoga County Mut. Fire Ins. Co., 2 Code R. 114.

[74] Maher v. Comstock, 1 How. Pr. 87; Johnson v. Anthony, 1 How. Pr. 173.

[75] Brown v. Briggs, 1 How. Pr. 152; Radcliff v. Van Benthuysen, 3 How. Pr. 67; Schenck v. McKie, 4 How. Pr. 246, 3 Code R. 24; Elliott v. Kennedy, 26 How. Pr. 422.

[76] Schenck v. McKie, 4 How. Pr. 246; Peebles v. Rogers, 5 How. Pr. 208, 3 Code R. 213; Hurd v. Davis, 13 How. Pr. 57.

[77] Green v. Warren, 14 Hun, 434.

section 24 of the Statutory Construction law,[78] since such statute does not apply to judicial proceedings.[79] For example, service of an order on Lincoln's birthday has been held valid.[80] So notice of a motion may be served on a Saturday afternoon, notwithstanding the half-holiday act, since the act of 1887 making Saturday, after 12 M., a half-holiday, for certain purposes, does not prevent the service of papers or the execution of writs in legal proceedings on that day, or any part of it.[81]

—— **On Sunday.** A paper cannot be served on Sunday.[82]

§ 661. Proof of service.

Where it is necessary, upon the trial of an action, to prove the service of a notice, an affidavit, showing the service to have been made by the person making the affidavit, is presumptive evidence of the service, upon first proving that he is dead or insane, or that his personal attendance cannot be compelled, with due diligence.[83] An affidavit of service should be made by the person who served the paper, though an affidavit of service by the attorney, on information from his clerk that it had been duly made, according to an indorsement on the notice produced, made by the clerk, who had quitted the state, has been held sufficient.[84] A statement of service of a paper on a named person will be presumed to mean personal service.[85] Ordinarily the proof of service should show that the mode of service was authorized. For example, an affidavit of service on an attorney's clerk must state that he was, at the time, in the attorney's office,[86] but need not name him.[87] So when service of a paper is made by leaving it in a conspicuous place during office hours

[78] L. 1892, c. 677, § 24.

[79] Didsbury v. Van Tassell, 56 Hun, 423. See, also, 7 Abb. Cyc. Dig. 562, 563.

[80] Matter of Bornemann, 6 App. Div. 524.

[81] Nichols v. Kelsey, 20 Abb. N. C. 14, 13 Civ. Proc. R. (Browne) 154, 2 City Ct. R. 410.

[82] Field v. Park, 20 Johns. 140.
Process cannot be served on Sunday. Penal Code, § 268.

[83] Code Civ. Proc. § 927.

[84] Jackson v. Howd, 3 Caines, 131.

[85] Central Bank v. Wright, 12 Wend. 190.

[86] Paddock v. Beebee, 2 Johns. Cas. 117, Col. & C. Cas. 135; Jackson v. Giles, 3 Caines, 88, Col. & C. Cas. 442.

[87] Tremper v. Wright, 2 Caines, 101.

when no one is present in the office, the affidavit should show that the office door was open or unlocked,[88] and an affidavit of service by mail must state the place of residence of the attorney on whom the service was made.[89] An affidavit that an order has been served on the attorney for the defendant is insufficient proof thereof where it does not contain the name of the attorney,[90] and an affidavit should not state that the service was made "on or about" a certain day, but should be definite as to the time.[91] The official certificate of a sheriff of another state is insufficient evidence of service of papers, where presented in this state. The officer should make his affidavit of service.[92]

The rule that where personal service of a complaint and summons or of a notice accompanying the summons and complaint, is made by one other than the sheriff, he must state in his affidavit of service his age or that he is more than twenty-one years of age, and the time and place and manner of service and that he knew the person served to be the person mentioned and described in the summons as defendant therein, and that he left with defendant a copy as well as delivered it to him,[93] is not applicable to the service of papers in general.

A positive affidavit of the service of papers in the course of legal proceedings cannot be overthrown by anything less than positive proof, or the most convincing circumstances.[94] Proof of the mailing of a notice properly addressed and postpaid raises a presumption that it was received by the person to whom it was directed, and when such proof of mailing is met by testimony of the person to whom the notice was directed that such notice never reached him, it is for the jury rather than the court to pass upon the issue of fact raised.[95] When it is claimed that the paper was not received, the party sending the paper must affirmatively show that the postage was prepaid and that

[88] Haight v. Moore, 36 Super. Ct. (4 J. & S.) 294.

[89] Brown v. Cook, 2 How. Pr. 40.

[90] Graham v. Powers, 22 State Rep. 95, 3 N. Y. Supp. 899.

[91] Sibley v. Waffle, 16 N. Y. 180, 190. The same rule applies to an affidavit of service of summons. Hickey v. Yvelin, 4 Month. Law Bul. 70.

[92] Thurston v. King, 1 Abb. Pr. 126.

[93] Rule 18 of General Rules of Practice.

[94] Annis v. Upton, 66 Barb. 370.

[95] McCoy v. City of New York, 46 Hun, 268.

the envelope was addressed to the attorney by his correct name at the place designated by him for the purpose of serving the paper.[96] If there be a dispute as to whether a paper served by mail was deposited in the mail within the statutory time, the post-mark on the envelope is not conclusive, especially where the post-mark is that of a small uncommercial place.[97] The affidavit of the superintendent of a branch post office that a letter containing an answer was mailed in one of the outlying letter boxes of his district, based upon the fact that the envelope bore a stamp different from that used on letters deposited in the branch office itself, has been held not sufficient to overcome the testimony of two witnesses that they deposited it in the branch office before 11:40 p. m. on the day it was due, though it was not delivered till 12 m. the day following.[98]

—— **Admission of service.** The attorney's admission of due service of notice is conclusive that it was given in season,[99] but is not conclusive as to the date of service, though prima facie correct.[100] Admission of "due and proper service," precludes a subsequent raising of the objection that the papers were not properly indorsed with the attorney's address.[101] It has been held, however, that an admission "of service" relates only to the mode of serving and does not of itself amount to a waiver of irregularity in the time for service, such as that the service was premature.[102]

The signature of an attorney need not be proved,[103] but the signature to an admission of service of papers by a person other than an officer of the court must be proved where the admission is thereafter relied on,[104] though the failure to verify the signature is a mere irregularity which must be taken advantage of, if at all, at the first opportunity.[105] The verification of the signa-

96 Seifert v. Caverly, 63 Hun, 604.
97 Yates v. Guthrie, 26 State Rep. 593, 7 N. Y. Supp. 177.
98 Gillespie v. Satterlee, 18 Misc. 606.
99 Talman v. Barnes, 12 Wend. 227; Coby v. Ibert, 6 Misc. 16.
100 Rogers v. Schmersahl, 2 Thomp. & C. 668.
101 Patterson v. McCunn, 38 Hun, 531.
102 Francis v. Sitts, 2 Hill, 362.
103 Ripley v. Burgess, 2 Hill, 360.
104 Litchfield v. Burwell, 5 How. Pr. 341.
105 Jones v. United States Slate Co., 16 How. Pr. 129.

ture should be by acknowledgment. It seems that the signature cannot be proved by the affidavit of a third person.[106]

An admission of service cannot be withdrawn on the ground that it was given inadvertently, where the attorney making the admission could not have been misled.[107]

Form of affidavit of personal service.

[Title of cause.]

State of New York, County of ———, ss.:

———, of the ———, being duly sworn, says that he is ——— years of age and upwards, and that on the ——— day of ———. in the year one thousand eight hundred and ———, he personally served a copy of the annexed ——— on ——— action, at ——— by delivering to and leaving with ——— a true copy thereof.

Sworn to before me, this ——— day of ———, 19—.

[Signature.]

—— Affidavit of service of judge's order.

[Title of cause.]

———, County of ———, ss.:

———. being duly sworn says: I am of the age of ——— years and upwards. On the ——— day of ———, 190—, at ———, I served ——— the annexed ——— and the signature of ——— thereto subsonally and leaving the same with ——— at the same time showing the annexed ——— on ——— by delivering ——— to said ——— perscribed. I know the person served as aforesaid to be the ——— mentioned and described in ———.

[Jurat.] [Signature.]

—— Affidavit of service of summons and complaint.

[Title of cause.]

———, County of ———, ss.:

being duly sworn, says, that he is ——— years of age. And that on the ——— day of ———, 190—, at ——— he served the summons and complaint in this action, hereto annexed, upon ———, defendant in this action, by delivering a true copy of said summons and complaint to such defendant personally, and leaving the same with ———. He further says, that he knew the person served as aforesaid to be ———, the person mentioned and described in the said summons as ———, defendant in this action,

[Jurat.] [Signature.]

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106 Duclos v. Benner, 25 State Rep. 413, 6 N. Y. Supp. 293.
But see Jones v. United States Slate Co., 16 How. Pr. 129.

107 Coby v. Ibert, 58 State Rep. 117, 6 Misc. 16.

Form of affidavit of service by mail—Court.

[Title of cause.]

———. County of ———, ss.:

———, being duly sworn, says that ———, the Attorney for the above named ———. resides at ———, N. Y. Deponent further says, he did, on the ——— day of ———, 190—, serve upon ——— the Attorney in the above entitled action for the above named ——— of which the annexed is a copy, by depositing the same, properly inclosed in a post-paid wrapper, in the Post Office at ——— aforesaid, directed to said ———, at ———, N. Y., ——— that being the address, within the State, designated by him for that purpose upon the preceding papers in the action and his place of residence [or the place where he then kept an office, between which places there then was and now is a regular communication by mail].

[Jurat.] [Signature.]

Form of admission of service.

Due and timely service of a copy of within affidavit and notice of motion is hereby admitted.

[Date.] [Signature.][108]

§ 662. Withdrawal of service.

If a notice is taken back from one to whom it was delivered by the party serving it, for the purpose of serving it on another person, the first delivery is no service.[109]

§ 663. Waiver of objections.

Objections to the mode of service of a paper are waived if it is retained and acted on by the attorney instead of a prompt return thereof.[110] This rule applies to pleadings and will be fully considered in relation thereto in the chapter on Pleading.[111] If a person objects to receiving a paper or notice, he should either return it or inform the attorney of the opposing party of his objections. A delay of two months is fatal.[112] So if a paper is served after the time within which to make service has

[108] This is usually indorsed on the back of the paper served.

[109] Earll v. Chapman, 3 E. D. Smith, 216.

[110] Georgia Lumber Co. v. Strong, 3 How. Pr. 246; Rogers v. Rockwood, 20 Civ. Proc. R. (Browne) 212.

[111] Post, part IV.

[112] Wright v. Forbes, 1 How. Pr. 240.

expired, it must be returned promptly on such ground or else advantage cannot be taken thereof.[113] Where papers are returned for irregularity, they should be returned to the party if there is no attorney's name on them. If the party is a municipal corporation, having a counsel under statute, they should be returned to him.[114]

[113] Lange v. Hirsch, 38 App. Div. 176.
[114] Taylor v. City of New York, 11 Abb. Pr. 255.

CHAPTER VI.

GENERAL REGULATIONS RESPECTING BONDS AND UNDERTAKINGS.

§ 664. Scope of chapter.

This chapter, as its title indicates, is intended to embrace the general rules as to bonds and undertakings laid down in sections 810 to 816 of the Code of Civil Procedure, together with the decisions thereunder. The rules relating especially to undertakings on appeal[1] are not within the scope of this work. So rules

[1] Code Civ. Proc. §§ 1305-1310, 1332-1334.

relating to bonds and undertakings in particular actions and proceedings will be left for consideration in subsequent chapters.

§ 665. Definition and nature of instruments.

An undertaking is primarily a promise. The word is most frequently used in the special sense of a promise given in the course of legal proceedings by a party or his counsel, generally as a condition to obtaining some concession from the court or the opposing party.[2] An undertaking is merely a simplified bond without a seal.[3] It is the instrument used under the Code system of practice as distinguished from the one used under the old system.[4] It is a bond provided for by statute, as distinguished from a bond which a court may, in the exercise of its discretion independent of statute, require as a condition of granting a favor asked.[5] Formerly it was held that a bond was not identical with an undertaking and that a statutory provision requiring that a bond be given was not complied with when a mere undertaking was offered in its stead though the word "bond" might sometimes be construed as including the word "undertaking,"[6] but the statute now expressly provides that a provision of law authorizing or requiring a bond to be given is complied with by the execution of an undertaking to the same effect.[7] So if an undertaking without a penalty is given where a bond is required it is enforceable.[8]

§ 666. Necessity.

The Code provides for certain undertakings in particular actions and proceedings but a certain class of actions are excepted from the rule. It is provided that in an action brought

[2] Cyc. Law Dict. 933.

[3] People ex rel. Com'rs of Public Charities & Correction v. Dando, 20 Abb. N. C. 245.

[4] People v. Lowber, 7 Abb. Pr. 158.

[5] Smith v. Falconer, 11 Hun, 481.

[6] People ex rel. Com'rs of Public Charities & Correction v. Dando, 20 Abb. N. C. 245.

[7] L. 1892, c. 677, § 16 (Statutory Construction Law).

[8] Dodge v. St. John, 96 N. Y. 260.

by the people of the state, or by a domestic municipal corporation, or by a public officer in behalf of the people, or of such a corporation, no security need be given for the purpose of procuring an order of arrest, an injunction order or a warrant of attachment or as a condition of obtaining any other relief in proceedings, though such corporation is liable for all damages sustained by the opposite party by reason of such order of arrest, attachment or injunction in the same case and to the same extent as sureties to an undertaking would have been if such an undertaking had been given.[9]

§ 667. Who must execute.

Where the statute requires a bond or undertaking, with sureties, to be given by, or in behalf of, a party or other person, he need not join with the sureties in the execution thereof, unless the statute requires him to execute the same,[10] but it has been held that this provision does not apply to undertakings on appeal where the surety on the undertaking is a surety company.[11] Even if the party must execute, it would seem that an undertaking may be amended so as to allow the party to execute it.[12] It seems that an agent may represent the principal and execute an undertaking in his name.[13] So where an undertaking is required by statute "on the part of the plaintiff," it need not be executed by him or his agent or attorney.[14]

—— **Number of sureties.** Execution by one surety is sufficient although the word "sureties" is used, unless the statute expressly requires two or more sureties, and even then a fidelity or surety company authorized by the laws of this state to transact business, may take the place of two sureties.[15] Further-

[9] Code Civ. Proc. § 1990.

[10] Code Civ. Proc. § 811.

[11] McGean v. MacKelier, 67 How. Pr. 273.

[12] Bellinger v. Gardner, 2 Abb. Pr. 441.

[13] Minister of foreign republic may sign undertaking. Republic of Mexico v. De Arangoiz, 12 Super. Ct. (5 Duer) 634.

[14] Leffingwell v. Chave, 18 Super. Ct. (5 Bosw.) 703.

[15] Code Civ. Proc. § 811.

But it seems that in the first department of the supreme court, the custom is to require two sureties, if individuals. Goldmark v. Magnolia

more, one instead of two sureties, where two are required, is not fatal to the enforcement of an undertaking as a common law obligation.[16]

§ 668. Who may be sureties.

The sureties must be residents of the state and householders or freeholders within the state, except where the surety is a fidelity or surety company or it is otherwise expressly prescribed by law.[17] A freeholder is one who has title to real estate.[18] It would seem that an unmarried resident of the state without immediate relatives and who boards is nevertheless a "freeholder or householder within the state" where he is engaged in the milling business in the state, he having leased a mill the machinery in which he owned.[19]

As before stated, an attorney or counselor cannot be a surety on any undertaking or bond required by law, or by rules of court, or by any order of the court or judge in any action or proceeding.[20] It seems, however, that an attorney who has retired from practice or has abandoned the profession, is not within the rule,[21] though it has been held that an attorney is

Metal Co., 28 App. Div. 264. See, also, Delamater v. Byrne, 57 How. Pr. 170.

The Fidelity & Casualty Company of New York, accepted in place of two sureties on an undertaking. Matter of Filer, 11 Abb. N. C. 107, 2 Civ. Proc. R. (McCarty) 64; Earle v. Earle, 49 Super. Ct. (17 J. & S.) 57, 6 Civ. Proc. R. (Browne) 171, note; Knevals v. Davis, N. Y. Daily Reg., Nov. 13, 1883; White v. Rintoul, 51 Super. Ct. (19 J. & S.) 512.

[16] Where a sheriff, at the solicitation of a defendant arrested in a civil action, accepts an undertaking in a larger amount than that prescribed by the order of arrest, and with one surety instead of two, as required, which undertaking is accepted by the plaintiff, the undertaking, though void as a statutory obligation, may be enforced as an agreement between the parties. Toles v. Adee, 84 N. Y. 222.

[17] Code Civ. Proc. § 812.

A person leasing offices has been deemed a householder. Somerset & Worcester Sav. Bank v. Huyck, 33 How. Pr. 323.

[18] People ex rel. Shaw v. Scott, 8 Hun, 566.

[19] Delamater v. Byrne, 59 How. Pr. 71.

[20] Ante, § 294; Rule 5 of General Rules of Practice.

[21] Evans v. Harris, 13 Wkly. Dig. 42; Phillips v. Wortendyke, 5 Month. Law Bul. 90, N. Y. Daily Reg., Oct. 8, 1883; Stringham v. Stewart, 3 How. Pr., N. S., 214, 8 Civ. Proc. R. (Browne) 420.

disqualified to act as a surety though he is not in active practice if he has an office and allows his name to remain on the roll.[22] And if an attorney, the real party in interest, does not appear on the record as a party nor as a party in interest, he cannot be accepted unless as a principal where there is the proper number of sureties in addition.[23] However, if the court does not reject an attorney offered as surety on an undertaking or if the creditor does not object, it would seem that the attorney is liable thereon[24] since an undertaking is not void because signed by an attorney as a surety. A party giving an undertaking cannot be one of the sureties where a certain number are required.[25] A husband may be surety for his wife[26] and it seems, under the married woman's act, that a wife who has a separate estate may be a surety for her husband.[27]

§ 669. Contents and validity.

A bond or undertaking, executed by a surety or sureties, must where two or more persons execute it, be joint and several in form.[28] This Code rule is for the benefit of the obligee, however, and hence a surety cannot defend an action on the bond or undertaking on the ground that it is not joint and several.[29] But an undertaking, although joint as to the obligors or sureties, is not necessarily joint as to the persons to or for whose benefit it is given. If their interests are joint, then the right of

[22] Wheeler v. Wilcox, 7 Abb. Pr. 73.

[23] Roebee v. Bowe, N. Y. Daily Reg., April 5, 1881

[24] American Surety Co. v. Crow, 22 Misc. 573.

[25] The appellant cannot be one of the two sureties required in an undertaking on appeal to the court of appeals, either to perfect the appeal or to stay execution. Morss v. Hasbrouck, 10 Abb. N. C. 407, 63 How. Pr. 84, 2 Civ. Proc. R. (McCarty) 119; Nichols v. MacLean, 98 N. Y. 458.

[26] Estate of Grove, 13 Civ. Proc. R. (Browne) 267. Contra,—Estate of McMaster, 12 Civ. Proc. R. (Browne) 177.

[27] Estate of Grove, 13 Civ. Proc. R. (Browne) 267. Contra,—Estate of McMaster, 12 Civ. Proc. R. (Browne) 177.

[28] Code Civ. Proc. § 812.

[29] Hubbard v. Gicquel, 14 Civ. Proc. R. (Browne) 15; Denike v. Denike, 61 App. Div. 492.

action upon the undertaking would also be joint. But when such interests are several, the right of action is also several.[30]

The obligee should ordinarily be stated[31] but the omission of a penalty in a bond does not affect its validity.[32] It is not necessary that a consideration moving to the sureties be stated.[33]

It has been held that a bond executed by an individual and not expressly binding his heirs, executors, and administrators, is insufficient[34] though such rule is not applied in practice to undertakings, which are less formal.

A fidelity or surety company may execute a bond or undertaking as surety by the hand of its officers, or attorney duly authorized thereto by resolution of its board of directors, a certified copy of which resolution, under the seal of said company, shall be filed with each bond or undertaking.[35]

A mistake in a recital in a bond or undertaking does not affect its validity where the essential part of the undertaking is correctly expressed.[36] But if an undertaking contains a provision which the statute does not require and is taken by an officer by color of his office, it is illegal and not enforceable.[37] So if an unauthorized undertaking is designedly taken by a public officer from a person under arrest as a ground of his discharge, it is void as having been taken by color of his office, though the officer may not have designed to violate the law.[38]

The voluntary act of the obligors in giving a bond under an order of court which affords the party his election to give it or not, is a waiver of objection to the authority of the judge making the order, to require such bond.[39]

30 Cunningham v. White, 45 How. Pr. 486.

31 Titus v. Fairchild, 49 Super. Ct. (17 J. & S.) 211.

32 Dodge v. St. John, 96 N. Y. 260.

33 Thompson v. Blanchard, 3 N. Y. (3 Comst.) 335; Seacord v. Morgan, 17 How. Pr. 394; judgment affirmed 4 Abb. App. Dec. 172, 4 Abb. Pr., N. S., 249, 35 How. Pr. 487, 3 Keyes, 636; Johnson v. Ackerson, 40 How. Pr. 222.

34 Schenke v. Rowell, 1 Abb. N. C. 295.

35 Code Civ. Proc. § 811.

36 Hyde v. Patterson, 1 Abb. Pr. 248.

37 Cook v. Freudenthal, 80 N. Y. 202.

38 Cook v. Freudenthal, 80 N. Y. 202.

39 Ford v. Townsend, 1 Abb. Pr., N. S., 159. 24 Super. Ct. (1 Rob.) 39.

—— **Amount.** Where an undertaking is in excess of the amount required by law, it would seem that it is void as to such excess.[40] If the statute requires that the sureties justify to an amount, double the amount of the judgment, the amount of the judgment must be inserted in the undertaking[41] but if it requires that the court fix the amount of the undertaking, it would seem that an approval by the court of an undertaking in a given amount is a sufficient fixing of the amount, though no other acts are done relating thereto.[42]

—— **Affidavit of obligor or sureties.** Except when executed by a fidelity or surety company, or when otherwise expressly prescribed by law, it must be accompanied with the affidavit of each surety, subjoined thereto, to the effect that he is a resident of and a householder or a freeholder within the state, and is worth the penalty of the bond, or twice the sum specified in the undertaking, over all the debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution.[43] A bond or undertaking given by a party without surety must be accompanied by his affidavit to the same effect.[44] An omission to attach an affidavit of justification when the undertaking is filed, may be disregarded however where it could serve no useful purpose or may be supplied on the return day by permission of the justice.[45]

—— **Signature and seal.** It is the better practice that a bond or undertaking be subscribed not only with the name of the surety but also with a statement as to his residence and occupation.[46] The omission of a seal is not fatal.[47]

[40] Post v. Doremus, 60 N. Y. 371.

[41] Harris v. Bennett, 3 Code R. 23.

[42] Dunseith v. Linke, 10 Daly, 363.

[43] Code Civ. Proc. § 812.

In the New York district court an undertaking on attachment or to procure an order of arrest, where executed by plaintiff without any surety, must state in plaintiff's affidavit of justification annexed thereto that he is a resident of, and a householder within, the city of New York, specifying the street and the number or other sufficient identification of the building where he resides. Code Civ. Proc. § 3219.

[44] Code Civ. Proc. § 812.

[45] Clark v. Hooper, 69 Hun, 445.

[46] Dorlan v. Wilson, 9 Civ. Proc. R. (Browne) 69.

[47] Doolittle v. Dininny, 31 N. Y. 350; Hyatt v. Dusenbury, 12 Civ. Proc. R. (Browne) 152, 5 State Rep. 846.

Form of undertaking.

[Title of court and cause.]

Whereas, the plaintiff above-named has claimed the delivery to him of certain chattels, specified in the affidavit made by ——— for that purpose, of the alleged value of ——— dollars, and has caused the same to be replevied by the sheriff of the county of ———, pursuant to the statute, but the same have not yet been delivered to the plaintiff; and, whereas, the defendant is desirous of having the said chattels returned to him:

Now, therefore, we, A. X., merchant, of the city of ———. ——— county, and B. Z., doctor of said city, for the procuring of such return, and in consideration thereof, do hereby jointly and severally undertake and become bound to said sheriff in the sum of ——— dollars for the delivery of said chattels to the plaintiffs, if delivery thereof is adjudged, or if the action abates in consequence of the defendant's death; and for the payment to him of any sum which the judgment awards against the defendant.

[Date.] [Signatures and Seals.]

State of New York,
County of ———; ss:

On the ——— day of ———, 19—, personally appeared before me, the above named ——— to me known to be the same person described, and who executed the above Bond, and acknowledged that they executed the same. [Signature and official title.]

State of New York,
——— County of ———, ss.:

——— in the within Bond named, being duly sworn, doth depose and say, that he is a resident and ——— holder within the State of New York, and is worth twice the sum specified in the above Bond over all the debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution.

Sworn to before me, this ——— day of ———, 19—.

[Signature and official title.]

State of New York,
County of ———, ss.:

——— one of the sureties to the foregoing bond being sworn, says, that he is a resident and ——— holder within the State of New York, and is worth twice the sum specified in the above bond over all the debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution.

Sworn to before me, this ——— day of ———, 19—.

[Signature and official title.]

§ 670. Sufficiency.

A bond or undertaking, required by statute to be given by a person, to entitle him to a right or privilege, or to take a proceeding, is sufficient, if it conforms substantially to the form therefor, prescribed by the statute, and does not vary therefrom, to the prejudice of the rights of the party, to whom, or for whose benefit it is given.[49] Hence, the use of the word "bond" instead of the word "undertaking" does not affect the validity of an undertaking[50] and an amendment of an undertaking defective in matter not of substance is unnecessary.[51] If the statute prescribes no particular form for an undertaking, it seems that a substantial compliance with the terms of the statute is sufficient.[52]

Even if an undertaking is void as a statutory obligation, it may oftentimes, if accepted, be enforced as a common-law agreement between the parties.[53] To be good as a common-law obligation, however, the undertaking must be an agreement made between the parties to the action: it not being sufficient that it was taken by an officer in the course of his official duty.[54]

§ 671. Construction.

In construing an undertaking, the language used is to have a reasonable interpretation according to the intent of the parties, as disclosed by the instrument read in the light of surrounding circumstances and of the purpose for which it was made, and

[49] Code Civ. Proc. § 729.

[50] Bergen v. Stewart, 28 How. Pr. 6.

[51] Irwin v. Judd, 20 Hun, 562.

[52] Wilson v. Allen, 3 How. Pr. 369; Conklin v. Dutcher, 5 How. Pr. 386, Code R., N. S., 49; Episcopal Church of St. Peter v. Varian, 28 Barb. 644.

[53] Toles v. Adee, 84 N. Y. 222; Ryan v. Webb, 39 Hun, 435.

[54] Cook v. Freudenthal, 80 N. Y. 202.

so as, if possible, to give the instrument its intended effect.[55] The order directing the giving of a bond or undertaking should be considered where the interpretation of the bond is in issue as the construction of the bond may be controlled by the terms of the order.[56]

§ 672. Acknowledgment and certification.

All bonds and undertakings must be duly proved or acknowledged, and certified, in like manner as deeds of real estate, before the same shall be received or filed.[57] The acknowledgment cannot be taken before an attorney in the action.[58] Failure of the principal to acknowledge the undertaking does not, however, affect the liability of the sureties[59] since the omission is a mere irregularity which may be waived in the action in which the undertaking is given.[60] The acknowledgment of the execution of an undertaking by the president and secretary of a fidelity company in the usual form of an acknowledgment by individuals is insufficient.[61]

§ 673. Justification.

As before stated, the bond or undertaking, except when executed by a fidelity or surety company, must be accompanied with an affidavit of the sureties (or of the obligor if there are no sureties) which must state the fact of residence, whether a householder or freeholder, and financial ability.[62] If there are no exceptions the bond or undertaking will ordinarily be approved as a matter of course unless a statute requires a justification notwithstanding the failure to file exceptions.

If the person for whose benefit the bond or undertaking is

55 Ryan v. Webb, 39 Hun, 435.

56 Elmendorf v. Lansing, 5 Cow. 468.

57 Code Civ. Proc. § 810; Rule 5 of General Rules of Practice; Beech v. Southworth, 1 Code R. 99, 6 Barb. 173. See L. 1896, c. 547, (3 Birdseye 3064 et seq.) as to acknowledgment of deeds.

58 Bliss v. Molter, 8 Abb. N. C. 241, 58 How. Pr. 112.

59 People v. Hammond, 26 State Rep. 486, 7 N. Y. Supp. 219.

60 McIntire v. Wiegand, 30 State Rep. 386, 24 Abb. N. C. 312.

61 White v. Rintoul, 6 Civ. Proc. R. (Browne) 259.

62 Ante, p. 676; Code Civ. Proc. § 812.

given, desires to except to the sufficiency of the signers his notice of exception should not be to the sufficiency of undertaking, but should be to the sufficiency of sureties.[63] Justification before exception is ordinarily insufficient.[64] If the bond or undertaking is executed by a fidelity or surety company authorized by the laws of this state to transact business, such company, if excepted to, must justify through its officers or attorney in the manner required by law of fidelity and surety companies.[65] Such a corporation need not possess the qualifications required of other sureties, i. e., that they be worth double the amount of the bond, but it is the duty of the judge, where the opposing party requires a justification, to hear evidence of the officers as required where other sureties justify, though the decision as to whether the statement of the company's assets justifies an approval of the undertaking is within the discretion of the judge.[66]

Whenever a justice or other officer approves of the security or reports upon its sufficiency, it is his duty to require personal sureties to justify, or if the security offered is by way of mortgage on real estate, to require proof of the value of such real estate.[67]

If the surety swears falsely as to his financial ability there are authorities holding that he may be punished for contempt[68] though the later authorities hold the contrary.[69]

—— **Justification of several sureties in lesser sums.** Where the penalty of the bond, or twice the sum specified in the under-

[63] Young v. Colby, 2 Code R. 68.

[64] Washburne v. Langley, 16 Abb. Pr. 259.

[65] Code Civ. Proc. § 811.

But it is not sufficient, as evidence on such justification, to produce a certified copy of the annual report of the company, filed in the office of the state superintendent of insurance. Haines v. Hein, 67 App. Div. 389.

[66] Earle v. Earle, 49 Super. Ct. (17 J. & S.) 57; McGean v. MacKeller, 67 How. Pr. 273.

[67] Rule 5 of General Rules of Practice.

[68] Nathans v. Hope, 5 Civ. Proc. R. (Browne) 401; Stephenson v. Hanson, 6 Civ. Proc. R. (Browne) 43.

[69] Norwood v. Ray Mfg. Co., 11 Civ. Proc. R. (Browne) 273; Simon v. Aldine Pub. Co., 11 Civ. Proc. R. (Browne) 267.

taking, is five thousand dollars or upwards, the court or judge may, in its or his discretion, allow the sum in which a surety is required to justify to be made up by the justification of two or more sureties each in a smaller sum.[70] But in that case a surety cannot justify, in a sum less than five thousand dollars, and when two or more sureties are required by law to justify, the same person cannot so contribute to make up the sum for more than one of them.[71] Thus where two sureties are required by law, unless each of them justifies in the full penalty of the bond, there must be two sets of justification in such full amounts. The penalty in other words must be twice made up, i. e. by two persons, each of whom is fully qualified, or by one person who is sufficient by himself and two or more persons who are unitedly sufficient, or by two distinct sets of persons each of which sets is worth in combination the full penalty of the bonds.[72]

—— **Approval.** The bond or undertaking, except as otherwise expressly prescribed by law,[73] must be approved by the court before which the proceeding is taken, or a judge thereof, or the judge before whom the proceeding is taken[74] though a reference may be ordered in the discretion of the court.[75]

[70] Code Civ. Proc. § 813.

[71] Code Civ. Proc. § 813.

[72] Trask v. Annett, 1 Dem. Surr. 171 which held that where a bond for $95,000 was required and one surety justified in a sum greater than the penalty, such excess could not supply a deficiency in the justification of the other surety, but that the latter must be replaced by a surety who can justify in $95,000 or two or more sureties who can, in combination, justify in that sum, each of whom must be worth above his debts at least $10,000.

But in the Matter of Thompson, 6 Dem. Surr. 56 where a bond for $15,000 was required, it was held that where one surety justified for $20,000 and the other surety justified for $10,000 the bond was sufficient under section 813 on the ground that the surety who justified in the larger sum was thereby rendered an additional surety, to make up to the extent of the excess, the amount the other one lacked.

[73] Exceptions to rule as to undertakings of bail (Code Civ. Proc. § 576), undertakings of claim and delivery (Code Civ. Proc. § 1699), undertakings in replevin before a justice of the peace (Clark v. Hooper, 69 Hun, 445).

[74] Code Civ. Proc. § 812.

[75] Code Civ. Proc. § 827.

The approval must be indorsed on the bond or undertaking[76] but not where the exception to the sureties was waived by agreement of the parties,[77] and if an undertaking is not approved before filing, the objection must be pointed out at once or it will be waived.[78]

If sureties are sufficient in law as shown by their sworn examinations, the judge is bound to approve the undertaking as he cannot refuse his approval because of facts within his own knowledge in regard to the sureties.[79] The certificate of approval need not state all the facts where the affidavit of justification is indorsed on and filed with the bond.[80]

§ 674. Filing.

A bond or undertaking required to be given, must be filed with the clerk of the court except where, in a special case, a different disposition thereof is directed by the court or prescribed by statute.[81] The general rules of practice provide that except where otherwise expressly provided by law, it is the duty of the attorney of the party required to give a bond or undertaking to forthwith file the same with the proper clerk.[82] If not so filed, any party to the action or special proceeding, or other person interested, may move the court to vacate the proceedings or order as if no bond or undertaking had been given.[83]

It is the practice where relief or a favor is granted to a party upon condition that he give a bond as security against any injurious consequences which may happen to his opponent arising from the granting of the favor or relief, to require the written security to be placed in the custody of the clerk of the court, regarding it as a paper in the cause properly belonging to the files of the court, until the contingency shall arise which it was intended to secure against.[84]

[76] Code Civ. Proc. § 812.
[77] Gopsill v. Decker, 4 Hun, 625.
[78] Travis v. Travis, 48 Hun, 343.
[79] O'Connor v. Moschowitz, 48 How. Pr. 451.
[80] Coithe v. Crane, 1 Barb. Ch. 21.
[81] Code Civ. Proc. § 816.
[82] Rule 4 of General Rules of Practice.
[83] Rule 4 of General Rules of Practice.
[84] Rice v. Whitlock, 15 Abb. Pr. 419.

§ 675. Rights of sureties.

The sureties in an undertaking have a right to intervene and prosecute the main action when it has been abandoned by the principal.[85] So they may be permitted to intervene to defend an action brought against their principal.[86]

§ 676. Release from liability.

A bond or undertaking, given in an action or special proceeding, continues in force after the substitution of a new party in place of an original party, or any other change of parties, and has thereafter the same force and effect as if then given anew, in conformity to the change of parties.[87] An extension of time of payment granted the principal discharges the surety.[88]

Sureties are released from liability where they fail or refuse to justify after being excepted to,[89] though not where the exception is afterwards withdrawn and the undertaking approved by consent.[90]

The release of the sureties to an undertaking does not release the sureties on a subsequent undertaking given in the same action,[91] though if a new undertaking is given for the judgment and costs, primary liability as between the two sets of sureties rests upon the latter and their release discharges the former.[92]

A mere postponement of one of the ordinary proceedings in a case in which an undertaking has been given, does not release the sureties from liability[93] nor does the issuance of an execution upon a judgment in violation of a stay of proceedings ob-

85 Hoffman v. Steinau, 34 Hun, 239.

86 Jewett v. Crane, 35 Barb. 208.

87 Code Civ. Proc. § 815; Potter v. Van Vranken, 36 N. Y. 619; Manning v. Gould, 47 Super. Ct. (15 J. & S.) 387, 1 Civ. Proc. R. (McCarty) 216.

88 Ross v. Ferris, 18 Hun, 210; Blackwell v. Bainbridge, 47 State Rep. 130, 19 N. Y. Supp. 681.

89 Manning v. Gould, 90 N. Y. 476; McIntyre v. Borst, 26 How. Pr. 411.

90 Goodwin v. Bunzl, 50 Super. Ct. (18 J. & S.) 441, 6 Civ. Proc. R. (Browne) 226; Decker v. Anderson, 39 Barb. 346.

But see Hoffman v. Smith, 34 Hun, 485.

91 Brennan v. Arnstein, 42 Super. Ct. (10 J. & S.) 375.

92 Hinckley v. Kreitz, 58 N. Y. 583.

93 Steinbock v. Evans, 122 N. Y. 551.

tained by an undertaking given on an appeal therefrom, if it was done by the attorney without the knowledge or sanction of his client.[94] So where no adverse decision has been made, the parties to an undertaking may, in good faith, agree upon a recovery which shall be binding upon the surety.[95] Likewise, a discharge in bankruptcy of a judgment debtor, pending an appeal from the judgment, does not release the sureties to an undertaking in the form required to stay execution, given upon the appeal.[96]

§ 677. Discharge on order.

The Code provides that the surety or sureties or the representatives of any surety or sureties on the bond of any trustee, committee, guardian, assignee, receiver, executor, administrator or other fiduciary, shall be entitled as a matter of right to be discharged from liability on compliance with certain conditions. The procedure provided for is, on notice to the principal, to apply to the court that accepted such bond or to the court of which the judge that accepted such bond was a member or to any judge thereof, praying to be relieved from liability as such surety or sureties for the act or omission of such principal occurring after the date of the order relieving such surety or sureties hereinafter provided for and that such principal be required to account and give new sureties.[97] Such notice of such application may be served on said principal personally within or without the state, or not less than five days prior to the date on which such application is to be made, unless it satisfactorily appears to the court, or a judge thereof, that personal notice cannot be given with due diligence within the state, in which case notice may be given in such manner as the court or a judge thereof directs.[98] Pending the hearing of such application the court or judge may restrain such principal from acting except to preserve the trust estate until further order.[99]

94 Lyons v. Cahill, 20 Abb. N. C. 42.
95 Long v. American Surety Co., 61 Hun, 595, 41 State Rep. 873.
96 Knapp v. Anderson, 71 N. Y. 466.
97 Code Civ. Proc. § 812.
98 Code Civ. Proc. § 812.
99 Code Civ. Proc. § 812.

Discharge on Order.

Upon the hearing of such application if the principal does not file a new bond in the usual form to the satisfaction of the court or judge the court or judge must make an order requiring the principal to file a new bond within such reasonable time not exceeding five days as the court or judge in such order fixes.[100] If such new bond shall be filed upon such hearing or within the time fixed by said order the court or judge must thereupon make a decree or order requiring the principal to account for all his acts and proceedings to and including the date of such order and to file such account within a time fixed, not exceeding twenty days, and releasing the surety or sureties making such application from liability upon the bond for any act or default of the principal subsequent to the date of such decree or order. If the principal fail to file such new bond within the time specified, a decree or order must be made revoking the appointment of such principal or removing him and requiring him to so account and file such account within twenty days.[101] If the principal fail to file his account, such surety or sureties, or representatives thereof, may make and file such account with like force and effect as though made and filed by such principal, and upon the settlement thereof credit shall be given for all commissions, costs, disbursements, and allowances to which the principal would be entitled were he accounting, and allowance be made to such surety or sureties or representative for the expense incurred in so filing such account and procuring the settlement thereof.[102] And after the filing of an account, the court or judge must, on the petition of the principal or surety or sureties or the representatives of any such surety or sureties, issue an order requiring all persons interested in the estate or trust funds to attend a settlement of such account at a time and place therein specified and upon the trust fund or estate being found or made good and paid over or properly secured, the surety or sureties shall be discharged from any and all further liability and the court or judge shall settle, determine and enforce the rights and liabilities of all parties to the proceedings in like manner and to the same extent as in actions for an accounting

100 Code Civ. Proc. § 812.
101 Code Civ. Proc. § 812.
102 Code Civ. Proc. § 812.

in the supreme court.[103] And upon demand made in writing by the principal such surety or sureties, or representatives thereof, shall return any compensation that has been paid for the unexpired portion of such suretyship.[104]

A supreme court decision that where a surety company engages for a consideration to become a surety, it ought not to be relieved from such contract except there be a breach of the same by the person with whom it contracts, and that this Code provision was not intended to apply to such a case,[105] was reversed by the court of appeals which held that surety companies are entitled to the benefits of the provision.[106]

§ 678. Amendments.

Where a bond or undertaking is defective, the court, officer, or body that would be authorized to receive it, or to entertain a proceeding in consequence thereof, if it was perfect, may on the application of the persons who executed it, amend it accordingly; and it shall thereupon be valid, from the time of its execution.[107] Hence if by mutual mistake of the parties the word "plaintiff" is inserted where the word "defendant" should have been, the undertaking is amendable.[108] The power to amend extends to defects in matter of substance.[109] Ordinarily the amendment of an undertaking is allowed as a matter of course.[110]

However, there is some question whether a new undertaking will be allowed to be filed where the undertaking objected to is fatally defective. It has been held that an undertaking which is defective in that the accompanying affidavit did not show that the sureties were residents or freeholders, or householders within the state, is so defective that the order resulting therefrom could not be retained on a motion to vacate, by allowing

103 Code Civ. Proc. § 812.
104 Code Civ. Proc. § 812.
105 Matter of Thurber's Estate, 43 App. Div. 528.
106 Matter of Thurber's Estate, 162 N. Y. 244.
107 Code Civ. Proc. § 730.
108 Clute v. Knies, 102 N. Y. 377.
109 Irwin v. Judd, 20 Hun, 562.
110 Travis v. Travis, 48 Hun, 343, per Pratt, J.

the filing of a new undertaking to cure the defect.[111] There is authority to the contrary, however, as it has also been held that an undertaking insufficient in form and in amount, might be cured by the substitution of a proper undertaking on a motion to vacate an order of arrest,[112] and that a new undertaking may be filed as an amendment to defeat a motion to vacate an attachment because of the insufficiency of the original undertaking.[113]

§ 679. Agreements between principal and surety.

Any party of whom a bond or undertaking is required may agree with his sureties for the deposit of moneys for which such sureties are or may be held responsible with a trust company authorized by law to receive deposits, if such deposit is otherwise proper, and for the safe-keeping of any or all other depositable assets for which such sureties may be held responsible, with a safe-deposit company authorized by law to do business as such, in such a manner as to prevent the withdrawal of such moneys and assets, or any part thereof, except with the written consent of such sureties, or an order of the court made on such notice to them, as it may direct.[114]

§ 680. Actions.

If the obligation is absolute, a demand before suit is unnecessary[115] though otherwise where the undertaking says "on demand."[116] The special term has no power to order a reference as to certain damages on an undertaking given to stay proceedings pending an appeal, but the remedy is by an action on the undertaking.[117] If an attorney not the attorney of record becomes surety, he cannot be proceeded against summarily as

111 Bondy v. Collier, 13 Misc. 15, 2 Ann. Cas. 28.

112 Bauer v. Schevitch, 11 Civ. Proc. R. (Browne) 433, 4 State Rep. 509, 25 Weekly Dig. 330.

113 Kissam v. Marshall, 10 Abb. Pr. 424.

114 Code Civ. Proc. § 813.

115 Epstein v. United States Fidelity & Guaranty Co., 29 Misc. 295; Krause v. Rutherford, 37 Misc. 382.

116 Sooysmith & Co. v. American Surety Co., 28 App. Div. 346.

117 Cambreling v. Purton, 40 State Rep. 771, 16 N. Y. Supp. 49.

an officer of the court, but must be pursued in the same manner as any other surety.[118]

An assignee of a debt secured by the undertaking may sue thereon[119] and when the interests of the persons for whose protection an undertaking is given are several, their right of action upon it is also several.[120]

Proof must be made, in an action on a bond or undertaking, of performance of all the conditions required by the statute as precedent to the action notwithstanding that the defendant sureties have been indemnified.[121]

—— **On bonds to people or public officers.** Where a bond or undertaking has been given as prescribed by law in the course of an action or a special proceeding, "to the people or to a public officer," for the benefit of a party or other person interested and provision is not specially made by law for the prosecution thereof, the party or other person so interested may maintain an action in his own name for a breach of the condition of the bond, or of the terms of the undertaking, upon procuring an order granting him leave so to do.[122] The order may be made by the court in which the action is or was pending, the city court of the city of New York, or a county court, if the bond or undertaking was given in a special proceeding, pending before a judge of that court; or in any other case, by the supreme court.[123] Notice of the application therefor must be given, as directed by the court or judge, to the persons interested in the disposition of the proceeds.[124] This provision, it will be noticed, applies only to bonds or undertakings given in the course of "an action or special proceed-

[118] Willmont v. Meserole, 16 Abb. Pr., N. S., 308.

[119] Snodgrass v. Krenkle, 49 How. Pr. 122.

So where, after affirmance at the general term, the judgments and all sums of money that might be had thereon, were assigned to plaintiff, he became, though not of record, practically plaintiff in the action, and the right of action on the undertaking given on appeal to the court of appeals passed to him. Burt v. Lustig, 42 State Rep. 700.

[120] Cunningham v. White, 45 How. Pr. 486.

[121] Rae v. Harteau, 7 Daly, 95.

[122] Code Civ. Proc. § 814.

[123] Code Civ. Proc. § 814.

[124] Code Civ. Proc. § 814.

ing."[125] Furthermore, it applies only to bonds or undertakings given "to the people or to a public officer."[126] Under this Code provision, an action upon a bond of the receiver of a partnership conditioned for the faithful performance of his duties and running to the clerk of the court is properly brought by the party interested, in his own name, after leave of court granted.[127]

—— **Defenses.** Sureties on an undertaking, when sued, cannot defend upon the ground of any irregularity in the proceedings[128] such as that the undertaking was not approved,[129] nor if the undertaking is accepted as sufficient, can they escape liability thereon on the ground of technical defects and informalities.[130] Nor does the fact that the surety was induced to sign by the fraud of his principal relieve him where the obligee was in no way privy to the fraud.[131] Furthermore it is no defense that the performance of the condition was an impossibility[132] or that the undertaking was not acknowledged and the appended affidavit not sworn to; nor that the judgment in the action in which the undertaking was given was brought about by an amicable arrangement.[133] So sureties who were accepted without formal justification, on the promise of the attorney that the party would have the undertaking indorsed as approved, cannot defeat the action against them on the ground that they failed to justify.[134]

125 Haight v. Brisbin, 100 N. Y. 219.

126 Krause v. Rutherford, 45 App. Div. 132.

127 Titus v. Fairchild, 49 Super. Ct. (17 J. & S.) 211.

128 Jewett v. Crane, 35 Barb. 208; Higgins v. Healy, 47 Super. Ct. (15 J. & S.) 207; Gibbons v. Berhard, 16 Super. Ct. (3 Bosw.) 635; Hill v. Burke, 62 N. Y. 116.

129 Bennett v. Mulry, 6 Misc. 304, 58 State Rep. 147.

130 Brennan v. Arnstein, 42 Super. Ct. (10 J. & S.) 375.

131 Coleman v. Bean, 1 Abb. App. Dec. 394, 32 How. Pr. 370, 3 Keyes, 94; Kelly v. Christal, 16 Hun, 242; McIntire v. Wiegand, 24 Abb. N. C. 312, 30 State Rep. 386, 10 N. Y. Supp. 3.

132 Cobb v. Harmon, 23 N. Y. 148; Wheaton v. Fay, 62 N. Y. 275.

133 The remedy of the surety against collusion is by application in the original action. McIntire v. Wiegand, 24 Abb. N. C. 312, 30 State Rep. 386, 10 N. Y. Supp. 3.

134 Gopsill v. Decker, 67 Barb. 211, 4 Hun, 625.

And if an undertaking given is accepted, and operates to stay proceedings, the obligor is estopped from questioning its validity.[135]

[135] Bates v. Merrick, 2 Hun, 568, 5 Thomp. & C. 701.

CHAPTER VII.

GENERAL REGULATIONS RESPECTING TIME.

§ 681. Scope of chapter.

Title 6 of chapter 8 of the Code, in the first article thereof, prescribes general regulations respecting the time in which to do an act and the computation thereof, and provides for extensions of time and for relieving a party from the omission to do an act within the time required by statute.[1] This chapter is intended to cover the same ground covered by such statutes.

§ 682. Length of notice.

Notice of any proceeding in an action if personally served, must be served at least eight days before the time appointed for the hearing unless other special provision is made by the statutes or the general rules of practice or unless there is an order to show cause which directs less than eight days service.[2]

[1] Code Civ. Proc. §§ 780-788.

[2] Code Civ. Proc. § 780.
Rule 37 of General Rules of Practice.
This rule is also made applicable to notices of motions and reference

§ 683. Extension of time.

Where the time, within which a proceeding in an action, after its commencement, must be taken, has begun to run, and has not expired, it may be enlarged, upon an affidavit showing grounds therefor, by the court, or by a judge authorized to make an order in the action.[3] Notice of the motion is ordinarily not required.[4] The affidavit on which is based an order enlarging the time to take a proceeding in an action after it is commenced but before the time has expired must be served with the order or a copy thereof, or else the order may be disregarded.[5] If defendant asks for an extension of time to answer or demur, he must present an affidavit of merits.[6] If the time to serve a pleading has been extended no further time will be granted except on two days' notice to the adverse party.[7]

—— Form of affidavit to obtain extension of time to plead.

[Title of court and cause.]

County of ———, ss.:

——— being duly sworn, says that he is ——— the attorney for the defendant ——— and resides in the ——— of ———.

That the complaint herein was served on the defendant ——— on the ——— day of ———, 190—, and that the time for said defendant to answer * * *

That no * * * extension of time to answer or demur has been granted by stipulation or order, and no previous application for an order extending the time to answer herein from the time when it will now expire has been made.

That the place of trial designated in the complaint is the county of

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should be made to the chapter on motions for a full discussion thereof. Double time is allowed where service is by mail. Code Civ. Proc. § 798.

[3] Code Civ. Proc. § 781.

As to judges who may make an order in an action, see ante, §§ 594-599.

[4] Travis v. Travis, 48 Hun, 343, 346.

[5] Code Civ. Proc. § 782. Rule applied—Corning v. Roosevelt, 18 Civ. Proc. R. (Browne) 193.

[6] Rule 24 of General Rules of Practice.

For a full consideration of this question, see post, § 852.

[7] Rule 24 of General Rules of Practice.

This matter will be further considered in the chapter relating to pleading.

———, in which the next ——— term of this court is appointed to be held on the ——— day of ———.

That the cause of action alleged in the complaint is * * * and the relief demanded therein is * * *.

That owing to * * * the defendant's attorney has been unable to serve an answer herein, for the reasons hereinbefore stated, and desires an order extending time so to do ——— days.

That from the statement of the case in the action made to deponent by the defendant * * * deponent verily believes that the defendant has a good and substantial defense upon the merits, to the cause of action set forth in the complaint or to some part thereof.

[Jurat.] [Signature.]

—— Form of order extending time to serve complaint.

Upon the foregoing affidavit it is ordered that the defendant's time to answer or demur herein be extended ——— days.

[Date.] [Signature.]

§ 684. Relief after expiration of time.

After the expiration of the time within which a pleading must be made or any other proceeding in an action, after its commencement, must be taken, the court, upon good cause shown, may, in its discretion, and upon such terms as justice requires, relieve the party from the consequences of an omission to do the act, and allow it to be done; except as otherwise specially prescribed by law.[9] However, this section does not apply to failure to serve process.[10]

As before stated an order extending may be made without notice but the rule is otherwise as to ex parte orders extending time made by a judge out of court, after the statutory time has run. They are mere nullities and may be safely disregarded.[11]

§ 685. Exceptions to extension and relief rules.

The Code exceptions to the Code rules relating to power to

[9] Code Civ. Proc. § 783; Wood v. Powell, 3 App. Div. 318, 321. Service of exceptions to referee's report. Gallagher v. Grand Trunk Ry. Co., 23 State Rep. 31. Failure to serve notice of motion in due time. Thompson v. Heidenrich, 66 How. Pr. 391.

[10] Bellamy v. Guhl, 62 How. Pr. 460.

[11] Fries v. Coar, 13 Civ. Proc. R. (Browne) 152.

extend time or to grant relief after expiration of the time, are as follows:

1. Time to commence an action.
2. Time to take an appeal.
3. Time to apply for continuance of an action where party has died or has incurred a disability.
4. Time fixed by court within which to file a supplemental complaint to continue an action, where failure to file abates the action.[12]

There is, however, an exception to the exceptions in that the Code provides that if a party entitled to appeal from a judgment or order, or to move to set aside a final judgment for error in fact, dies before the expiration of the time to appeal or to make the motion, such appeal may be taken or motion may be made by the heir, devisee, or personal representative of the decedent, at any time within four months after his death.[13]

§ 686. Computation of time.

Section 788 of the Code of Civil Procedure which fixed the rules for the computation of time was expressly repealed by the Statutory Construction Law.[14]

——**Years.** The term "year" means three hundred and sixty-five days except in leap years. It also means twelve months. Half-year means six months and quarter of a year means three months.[15]

——**Months.** The term "month" means a calendar and not a lunar month.[16] Formerly the word "month" meant a lunar month, unless otherwise expressed, except in reference to bills and notes.[17]

[12] Code Civ. Proc. § 784.

[13] Code Civ. Proc. § 785; Durant v. Abendroth, 8 Civ. Proc. R. (Browne) 87.

[14] L. 1892, c. 677, §§ 25-28.

[15] L. 1892, c. 677, § 25.

[16] L. 1892, c. 677, § 26; People v. Nash, 12 Wkly. Dig. 545.

A notice of thirty days, given during a calendar month which contains but thirty days, is a "month's notice." People ex rel. McGuire v. Ulrich, 2 Abb. Pr. 28.

[17] Leffingwell v. White, 1 Johns. Cas. 99; Parsons v. Chamberlin, 4

A number of months after or before a certain day shall be computed by counting such number of calendar months from such day, exclusive of the calendar month in which such day occurs, and shall include the day of the month in the last month so counted having the same numerical order in days of the month as the day from which the computation is made, unless there be not so many days in the last month so counted, in which case the period computed shall expire with the last day of the month so counted.[18]

——**Days.** A calendar day includes the time from midnight to midnight.[19] Sunday or any day of the week specifically mentioned means a calendar day.

Section 788, immediately before its repeal, read as follows: "The time within which an act, in an action or special proceeding, brought, as specified in the last section, is required by law to be done, must be computed, by excluding the first, and including the last day; except where it is otherwise specially prescribed by law. If the last day is Sunday, or a public holiday, it must be excluded. Where the act is required to be done within two days, and an intervening day is Sunday, or a public holiday, it must also be excluded."

It has been said that the statutory construction act does not materially change the existing rule for the computation of time, except, perhaps, to more definitely fix the event from which the count is to be made.[20] It provides that "a number of days specified as a period from a certain day within which or after or before which an act is authorized or required to be done means such number of calendar days exclusive of the calendar day from which the reckoning is made. Sunday or a public holiday other than a half-holiday must be excluded from the reckoning if it is the last day or an intervening day of any such period of two days. In computing any specified number of days, weeks or months from a specified event, the

Wend. 512; People ex rel. Moulton v. City of New York, 10 Wend. 395.

[18] L. 1892, c. 677, § 26.

This rule closely follows the rule laid down by the court of appeals in 1875 in Roehner v. Knickerbocker Life Ins. Co., 63 N. Y. 160.

[19] L. 1892, c. 677, § 27; People v. Nash, 12 Wkly. Dig. 545; Pulling v. People, 8 Barb. 384.

[20] People v. Burgess, 153 N. Y. 561.

day on which the event happens is deemed the day from which the reckoning is made. The day from which any specified number of days, weeks or months of time is reckoned shall be excluded in making the reckoning."[21] This rule does not apply, however, in the computation of "years," in which case the first day must be included.[22]

—— **Fractions of days.** Fractions of a day will not be noticed except when the hour itself is material as where questions of priority of creditors are involved.[23]

—— **Night time.** Night time includes the time from sunset to sunrise.[24]

—— **Standard time.** Acts are to be performed according to standard time which is, in New York, the seventy-fifth meridian of longitude west from Greenwich.[25]

[21] L. 1892, c. 677, § 27 (Statutory Construction Law).

Rule applied to lease for three years and four months. Frost v. Akron Iron Co., 1 App. Div. 449.

A petition in summary proceedings which by its recital of dates on its face shows that three days' notice has not been given, the petition being dated January 2d and the notice dated December 29th, January 1st being a legal holiday and excluded, confers no jurisdiction. Bristed v. Harrell, 20 Misc. 348, 79 State Rep. 918, 45 N. Y. Supp. 918.

For collection of decisions under the old rules, see 12 Abb. Cyc. Dig. 819-822.

[22] Aultman & Taylor Co. v. Syme, 163 N. Y. 54, 30 Civ. Proc. R. (Menken) 334; Connecticut Nat. Bank v. Bayles, 163 N. Y. 561.

[23] Marvin v. Marvin, 75 N. Y. 240; Prentiss v. Bowden, 8 Misc. 420; Columbia Turnpike-road v. Haywood, 10 Wend. 422; Hughes v. Patton, 12 Wend. 234; Rusk v. Van Benschoten, 1 How. Pr. 149; Blydenburgh v. Cotheal, 4 N. Y. (4 Comst.) 418, 5 How. Pr. 200, 3 Code R. 216; Jones v. Porter, 6 How. Pr. 286.

Hence, where a marriage in good faith takes place at eleven o'clock in the forenoon, and a decree of the wife's divorce from a former marriage is not actually perfected until two o'clock in the afternoon of the same day, though the trial took place several days before, the marriage is valid, both parties believing she was divorced. Merriam v. Wolcott, 61 How. Pr. 377.

So, since an infant is competent to sue at any moment on the day before his twenty-first birthday, such day is to be included in the computation of ten years, which the statute of limitations allows after removal of the disability. Phelan v. Douglass, 11 How. Pr. 193.

[24] L. 1892, c. 677, § 27.

[25] L. 1892, c. 677, § 28.

—— **Publication of legal notices.** The period of publication of a legal notice, in an action or special proceeding, brought in a court, either of record or not of record, or before a judge of such a court, must be computed, so as to exclude the first day of publication, and include the day, on which the act or event, of which notice is given, is to happen, or which completes the full period of publication.[26] Hence, where service of summons is required to be published for six weeks, forty-two days must elapse from the first publication before service is complete.[27] So where twelve weeks' publication is required on foreclosing by advertisement, eighty-four days must elapse after the first publication before the sale.[28]

[26] Code Civ. Proc. § 787.

[27] Market Nat. Bank v. Pacific Nat. Bank, 89 N. Y. 397; Estate of Koch, 19 Civ. Proc. R. (Browne) 165. But see Steinle v. Bell, 12 Abb. Pr., N. S., 171.

[28] Bunce v. Reed, 16 Barb. 347.

CHAPTER VIII.

MISTAKES, OMISSIONS, DEFECTS, AND IRREGULARITIES.

§ 687. Historical.

Statutes of amendments and jeofails were passed in England at an early day. They are so called because where a pleader perceives any slip in the form of his proceedings and acknowledges the error (jeofaile), the statute authorizes an amendment though the amendment is seldom made as the benefit is attained by the court's overlooking the exception.[1]

[1] 3 Bl. Comm. 407 et seq., where the history of the various statutes is set forth at some length showing the extremes to which the courts and statutes went at various times both in allowing and disallowing amendments. See, also, Diamond v. Williamsburgh Ins. Co., 4 Daly, 494, where the common law rules and the enlargement thereof by statutes, are discussed.

"The origin and progress of amendments at common law and under the statutes of jeofails exhibit a curious portion of legal history. At

§ 688. Resume of statutes.

In order to further the administration of justice, the Code has made provisions practically annulling the effect of many "mistakes, omissions, defects, and irregularities." The Code provisions are embraced in title 1 of chapter 8 of the Code.[2] Section 721 enumerates certain irregularities which can not be urged after judgment. Section 722 provides for an amendment of such irregularities after judgment either by the court in which the judgment is rendered or by an appellate court. Section 723 provides for amendments before and after judgment. It also requires that an error or defect not affecting the substantial rights of the adverse party must be disregarded in every stage of the action. Section 724 relates to relief from a judgment, order, or other proceeding, taken against a party through his mistake, inadvertence, surprise, or excusable neglect, and authorizes the supplying of an omission in any proceeding. Section 725 relates to amendments of returns by officers, courts, and other tribunals. Section 726 provides for the use of a copy of a pleading or paper where the original is lost. Section 728 provides that an affidavit is sufficient though

one period, parties were so much harassed by writs of error, brought for mistakes in orthography or the slightest clerical misprisions, that the chances for justice were forlorn. Redress, in a very limited form, was, indeed, granted at common law. This, at first, was not extended beyond the term in which the judicial act was done; for during the term the record was supposed to be in the recollection of the court; but, afterwards, no alteration was admitted. At a subsequent period the rule was more liberally extended; and all the proceedings were considered as only in fieri, and subject to the control of the court, at any time before judgment was rendered and enrolled. Such, however, was the general conduct of the courts of common law in England, that justice was entangled in a net of technical form, and the Parliament was compelled, by twelve different statutes, denominated the statutes of amendments and jeofails, to interfere and remedy the enormous evil. The amendments authorized by these statutes, are seldom, if ever actually made; but their benefit is attained by the courts overlooking the exception. * * * Our statute is a transcript of the different acts passed on this subject by the British Parliament." Cheetham v. Tillotson, 4 Johns. 499.

[2] Code Civ. Proc. §§ 721-730.

it has no title or an insufficient title. Sections 729 and 730 relate to defects in bonds and undertakings.

Mr. Bishop, in his work on Code Practice in Personal Actions, draws a distinction between the powers of the court before and after judgment and says: "The distinction between the powers of the court before and after judgment arises from their different origin. At common law, independent of statute, the court might grant amendments while the proceedings in an action were 'in paper'—that is, until judgment signed, and during the term in which it was signed; but after judgment the power to amend was statutory, being conferred by the act 'concerning amendments and jeofails' (4 and 5 Anne, c. 16). This statute was re-enacted in this state (1 R. L., ch. xxxii.). The Revised Statutes enlarged the power of amendment after judgment and employed substantially the same language as is now found in §§ 721 and 722 of the Code."[3]

§ 689. Scope of chapter.

Inasmuch as the Code provisions just referred to are very general in their application and relate to practically all the proceedings in an action, it is deemed best to briefly consider them at this time, though consideration in detail in so far as applicable to particular papers, process, pleadings, etc., is concerned, will be deferred until subsequent chapters. This chapter is intended to give merely a brief resume of the statutes and a few of the general rules relating to all amendments.[4]

§ 690. Irregularities and nature thereof.

An irregularity consists in the doing of some act at an unseasonable time or in an improper manner, as in omitting to do something that is necessary for the due and orderly conduct of the suit. It may, therefore, properly be defined to be a want of adherence to some prescribed rule or mode of proceeding, and may arise in every stage of an action from the service of the summons to the entry of satisfaction of judgment

[3] Bishop's Code Practice in Personal Actions, 295.

[4] See chapters relating to process, pleadings, affidavits, judgments, attachments, bonds and undertakings, motions and orders, verdicts, etc.

and execution.[5] There is a marked, and in many respects, important and substantial, distinction between defects in practice proceedings which constitute mere irregularities and such as render the proceedings a total nullity and altogether void. Where the proceeding adopted is that prescribed by the practice of the court, and an error is merely in the manner of conducting it, such an error is an irregularity, and may be waived by the laches or subsequent acts of the opposite party; but where the proceeding itself is altogether unwarranted, totally dissimilar to that which the law authorizes, then the proceeding is a nullity and cannot be made regular by any act of either party.[6] The term "irregularity" is sometimes used in contradistinction to jurisdictional defects which courts have no authority to authorize or approve. The term "irregularities" as used in a statute requiring a motion to set aside a judgment for irregularities to be made within a year, has been held to be those arising in practice and consisting in some step or proceeding taken in the prosecution or defense of an action which is without authority of law or contrary to some rule of practice.[7] For instance, under the Code provision providing that a motion to set aside a judgment for irregularity must be made within a year, it was held that an addition to a judgment beyond that authorized by the verdict was an irregularity, i. e., an act done without legal authority.[8]

On the other hand, however erroneous a decision of a judge in the progress of a trial may be, if it relate to the reception of evidence or granting a nonsuit, it is not an irregularity within the ordinary and technical meaning of that word.[9]

Irregularities either affect the merits or do not affect the merits. The latter are usually termed technical irregularities.[10] The principal difference, however, lies in the fact that when a motion is based on a technical irregularity the notice of motion must specify the irregularity complained of[11] and

5 4 Wait's Pr. 629.
6 4 Wait's Pr. 630.
7 Corn Exch. Bank v. Blye, 119 N. Y. 414.
8 Corn Exch. Bank v. Blye, 119 N. Y. 414.
9 Craig v. Fanning, 6 How. Pr. 336.
10 See Decker v. Kitchen, 21 Hun, 332.
11 Rule 37 of General Rules of Practice.

that an order based thereon is not appealable since not affecting a substantial right.

§ 691. Taking advantage of irregularities.

An irregularity may be waived by taking steps in the proceeding after knowledge thereof or by subsequent acquiescence. At first it was questioned whether the rule was not confined to cases where the party complaining of the irregularity had taken some subsequent step, but it was afterwards held to apply equally where the party, with knowledge of the irregularity, remained passive and allowed the other party to take a subsequent step; and thereafter, as indicating the general policy of the courts upon the subject, it was held that where a party moves for irregularity he is bound to state every irregularity of which he wishes to take advantage, and is considered to have waived all those which he does not state at the time. The principle of this rule applies equally whether the motion is made before or after judgment.[12] If a proceeding is a nullity, however, the objection cannot be waived. In all applications to set aside proceedings for irregularity, the party complaining must make his application at the first opportunity after he has knowledge of the fact and before any future proceedings have been had.[13] However, if the irregularity affects the substantial rights of a party, application need not be made at the earliest moment.[14]

The proper mode of raising an objection to a mere irregularity is to make a motion and then if the motion is denied to take an appeal or save the question for review on appeal from the final judgment.[15]

Ordinarily, only the party affected can take advantage of an irregularity. Thus, where proceedings are not authorized by the statute, the remedy for the defects is in the party alone.[16] In some instances, however, any person interested may apply for a correction.

[12] Rule 37 of General Rules of Practice.
[13] City of New York v. Lyons, 1 Daly, 296.
[14] Swezey v. Bartlett, 3 Abb. Pr., N. S., 444.
[15] Ingersoll v. Bostwick, 22 N. Y. 425.
[16] Gere v. Gundlach, 57 Barb. 13.

§ 692. Defects cured by verdict, report or decision and judgment.

In a court of record, where a verdict, report, or decision has been rendered, the judgment shall not be stayed, nor shall any judgment of a court of record be impaired or affected by reason of either of the following imperfections, omissions, defects, matters, or things, in the process, pleadings, or other proceedings:

1. For want of a summons or other writ.

2. For any fault or defect in process, or for misconceiving a process, or awarding it to a wrong officer.

3. For an imperfect or insufficient return of a sheriff or other officer, or because an officer has not subscribed a return actually made by him.

4. For a variance between the summons and complaint.

5. For a mispleading, insufficient pleading, or jeofail.

6. For want of a warrant of attorney by either party.

7. For the appearance by attorney of an infant party, if the verdict, report, or decision, or the judgment is in his favor.

8. For omitting to allege any matter, without proof of which the verdict, report, or decision ought not to have been rendered.

9. For a mistake in the name of a party or other person; or in a sum of money; or in the description of property; or in reciting or stating a day, month, or year; where the correct name, sum, description, or date has been once rightly stated, in any of the pleadings or other proceedings.

10. For a mistake in the name of a juror or officer.

11. For an informality in entering judgment, or making up the judgment-roll.

12. For an omission on the part of a referee to be sworn; or for any other default or negligence of the clerk, or any other officer of the court, or of a party, his attorney or counsel, by which the adverse party has not been prejudiced.[17]

Each of such omissions, imperfections, defects, and variances, and any other of like nature, not being against the right and justice of the matter, and not altering the issue between

[17] Code Civ. Proc. § 721.

the parties, or the trial, must, when necessary, be supplied, and the proceeding amended, by the court wherein the judgment is rendered, or by an appellate court.[18]

The application of these Code provisions will be considered in connection with subsequent chapters relating to the particular defect or omission objected to.

§ 693. Amendments.

The leading features in modern practice are that amendments are allowed with great liberality, that their allowance or refusal is discretionary with the court, and that the exercise of such discretion will not be reviewed except in a clear case of abuse.[19] The rule has been laid down that amendments are in all cases matters of favor and not of strict right.[20] But amendments are favored. The statutes of amendment are to be liberally construed in furtherance of the right to amend. But it should always be kept in mind that amendments are allowed only in "furtherance of justice." Hence, the court may properly refuse to allow an amendment which is immaterial, unnecessary, indefinite, or which will not accomplish the purpose for which it is intended.[21]

All mere irregularities are amendable but an absolute nullity cannot be amended.

The statutes providing for amendment, in so far as the mere "power" of the court to amend is concerned, are declaratory of the common law,[22] and hence a court may allow amendments on equitable grounds though not provided for by the Code.[23] The power of amendment is an inherent power.

[18] Code Civ. Proc. § 722.

[19] 1 Enc. Pl. & Pr. 516, note 2.

[20] Hatfield v. Secor, 1 Hilt. 535, citing Graham's Pr. (2d Ed.) 669.

[21] 1 Enc. Pl. & Pr. 523.

[22] Christal v. Kelly, 88 N. Y. 285.

Code Civ. Proc. §§ 721-728 providing for amendments relate mainly to actions and do not refer to special proceedings except in § 728, but it seems that said provisions of the Code do not repeal Rev. St. pt. 3, c. 7, title 5, § 10, extending the power to amend technical defects to special proceedings as well as ordinary actions. People ex rel. New York Cent. & H. R. R. Co. v. Cook, 62 Hun, 303.

[23] Weed v. Saratoga & S. R. Co., 19 Wend. 534.

Courts not of record may exercise the power of amendment. So also may an appellate court, such as the court of appeals. Amendments by a referee are authorized by statute.[24] A court cannot, however, amend proceedings in another court.[25] So if a court is without jurisdiction of an action it has no authority to allow amendments.

The rule is often stated that an amendment will not be allowed unless there is something in the record to amend by. For instance, a complaint which fails to state any cause of action whatever cannot be amended.

Mistakes of a court,[26] or of its officers, including an attorney,[27] except where the rights of third persons who have acquired interests in the meantime in good faith will be prejudiced,[28] are amendable except where the amendment would conflict with the requirements of a statute.[29]

An amendment nunc pro tunc is not operative as against persons who are not parties to the action and have no opportunity to be heard on the question.[30]

—— **The broad Code rule.** The Code provides that the court may, upon the trial or at any other stage of the action, before or after judgment, in furtherance of justice, and on such terms as it deems just, amend any process, pleading or other proceeding by adding or striking out the name of a person as a party, or by correcting a mistake in the name of a party "or a mistake in any other respect" or by inserting an allegation material to the case.[31] Furthermore the court may, upon the trial or at any other stage of the action, before or after judgment, in furtherance of justice, and on such terms as it deems just, amend a pleading "or other proceeding" so as to make

[24] Code Civ. Proc. § 1018.

[25] Buchan v. Sumner, 2 Barb. Ch. 165.

[26] Clapp v. Graves, 2 Hilt. 317.

[27] Chichester v. Cande, 3 Cow. 39; King v. Harris, 34 N. Y. 330.

[28] Bank of Rochester v. Emerson, 10 Paige, 359.

[29] Wait v. Van Allen, 22 N. Y. 319.

[30] Weeks v. Tomes, 16 Hun, 349.

[31] Code Civ. Proc. § 723.

For construction of this Code rule, see post, § 693.

it conform to the facts proved, where the amendment does not change substantially the claim or defense.[32]

—— **Of returns of officers.** A court to which a return is made by a sheriff or other officer or by a subordinate court or other tribunal, may, in its discretion, direct the return to be amended in matter of form, either before or after judgment.[33]

—— **Procedure.** Ordinarily an amendment can only be made pursuant to leave of court. The Code expressly provides that a process, pleading or record cannot be altered by the clerk or any other officer of the court or by any other person without the direction of the court or of another court of competent authority, except in a case where a party or his attorney is specially authorized by law to amend a pleading.[34] It is sometimes permissible and proper, however, for the court of its own motion to order an amendment.[35]

Notice should be given of the motion to amend[36] though where a motion is made to set aside a proceeding on account of a slight mistake, the amendment will usually be allowed to correct such mistake without a cross motion for that purpose.[37]

An affidavit is ordinarily unnecessary but the application for leave to amend should be accompanied by a statement of the amendment which the party proposes to make.[38] It has been held that the party seeking leave to amend must show some reasonable excuse for the defect sought to be corrected[39] but this rule was laid down in a case where the amendment was of a pleading and it would seem that it would not be applicable in all cases.

An amendment may be refused because of unnecessary and inexcusable delay in making the application. On application

32 Code Civ. Proc. § 723.

33 Code Civ. Proc. § 725; Todd v. Botchford, 86 N. Y. 517.

34 Code Civ. Proc. § 727.

35 Reck v. Phœnix Ins. Co., 3 Civ. Proc. R. (Browne) 376.

36 Stephens v. Hall, 25 Abb. N. C. 300; Work v. Tibbits, 61 Hun, 566 But see Hamilton v. Third Ave. R. Co., 13 Abb. Pr., N. S., 318.

37 Wolford v. Oakley, 43 How. Pr. 118.

38 Shaw v. Lawrence, 14 How. Pr. 94; Crooks v. Second Ave. R. Co. 66 Hun, 626; 20 N. Y. Supp. 813; Stern v. Knapp, 52 Super. Ct. (20 J & S.) 14.

39 Cocks v. Radford, 13 Abb. Pr. 207.

for leave to amend, the merits will not be inquired into except to see that the amendment is not clearly frivolous.[40]

Amendments should be sought in the lower court even after the cause has been removed on appeal or writ of error.[41] So if an error has been made in respect to the form of a judgment, the error must be corrected, if at all, by motion in the court of original jurisdiction.[42]

—— **Terms on allowing amendment.** The right to impose terms on granting leave to amend is absolute, in the absence of a statute or rule of court to the contrary. Amendments may be allowed on such terms as the court deems just.[43] The terms which will be imposed are within the discretion of the trial court. The adverse party should usually be indemnified for all the expense to which he will be put by the amendment. The payment of the costs up to the time of the amendment is often required where a pleading is amended. What are just terms will depend on the time when the application is made, the nature of the amendment, the opportunity of correcting the mistake before, etc. Further discussion will be postponed until subsequent chapters relating to pleadings, process, etc.

—— **Mode of amending.** An amendment may be made by interlineation or cancellation, by attaching the amendment to the paper amended, or by filing a new amended paper to take the place of the original paper. The mode of amendment depends largely on what is to be amended. Hence the question as to the mode of amending particular papers will be deferred for consideration in subsequent chapters relating thereto.

—— **Order.** The order allowing an amendment should specify the matter to be amended and prescribe the terms, if any. It should also direct the mode of making the amendment.

—— **Service.** An amendment allowed on the trial does not require to be served unless such service is made a condition of the allowance.[44] If service is necessary, service of a certified copy of the amended paper is sufficient.[45]

40 Turner v. Dexter, 4 Cow. 555.
41 Kenyon v. New York Cent. & H. R. R. Co., 76 N. Y. 607.
42 Corn Exch. Bank v. Blye, 119 N. Y. 414.
43 Code Civ. Proc. § 723; Hand v. Burrows, 15 Hun, 481.
44 Lane v. Hayward, 28 Hun, 583.
45 Jackson v. Belknap, 7 Johns. 300.

§ 694. Disregarding errors.

In every stage of the action, the court must disregard an error or defect in the pleadings or other proceedings "which does not affect the substantial rights" of the adverse party.[46] Statutes of amendments and jeofailes authorize an amendment of errors or the overlooking of the error by the court as if an amendment has been actually made.[47] Therefore the court may disregard any error which cannot mislead the adverse party, and which does not put him to any inconvenience or compel him to act differently from what he would have done had no error been committed.[48]

§ 695. Relief against mistakes, omissions or neglect.

The court may, in its discretion and upon such terms as justice requires, at any time within one year after notice thereof, relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect.[49] It may also, in its discretion and upon such terms as justice requires, within one year after notice thereof, supply an omission in any proceeding.[50] Furthermore, if a proceeding taken by a party fails to conform to a provision of the Code, the court may in its discretion and on just terms permit an amendment thereof, within a year after notice of the non-conformity, to conform it to the Code provision.[51]

Irrespective of the authority conferred by statute, the power of a court of record to modify, vacate, and set aside its own orders, judgments, and proceedings, in its discretion, is too well established to admit of question.[52] A fortiori, all the proceedings in an action are under the control and subject to the direction of the court so long as the action is pending.[53] A

[46] Code Civ. Proc. § 723.

[47] Cyc. Law Dict. 503. Definition of joefaile.

[48] 4 Wait's Pr. 692.

[49] Code Civ. Proc. § 724.

[50] Code Civ. Proc. § 724.

[51] Code Civ. Proc. § 724.

[52] Dietz v. Farish, 43 Super. Ct. (11 J. & S.) 87; Ladd v. Stevenson, 112 N. Y 325; Matter of City of Buffalo, 78 N. Y. 362.

[53] Barry v. Mutual Life Ins. Co., 53 N. Y. 536.

party may be relieved from a judgment entered in his favor.[54] The notice required to be filed within a year must be a written notice.[55] The application of these rules will be considered in subsequent chapters.[56]

[54] Montgomery v. Ellis, 6 How. Pr. 326.
[55] Bissell v. New York Cent. & H. R. R. Co., 67 Barb. 385.
[56] See post. volume III.

PART III.

COMMENCEMENT OF THE ACTION.

CHAPTER I.

THE SUMMONS.

—— Necessity of "indorsement."
—— Sufficiency.
—— Form of indorsement.
—— Effect of failure to indorse.
Indorsement on summons in matrimonial actions, § 705.
Supplemental summons, § 706.
Filing summons, § 706a.

§ 696. Commencement of actions at common law.

Actions at common law were originally commenced by the issuance and service of one of the original writs provided under that system for requiring the appearance of the defendant and further process, such as the writ of capias ad respondendum was available for summarily compelling an appearance when the original command was disregarded. The original writs thus issued were followed by the declaration of the plaintiff, containing the formal statement of his cause of action, but these writs were abolished in personal actions by the statute of 2 Wm. IV. c. 39, and since that time actions at law in England have been commenced by the service of a summons.

§ 697. Commencement of suits in equity.

In equity procedure, the initial step in the commencement of the suit was the filing of the petition or bill by the complainant, setting forth the facts upon which relief was sought, and praying, in addition to such relief, for the issuance of a writ of subpoena to compel the defendant to appear and answer the allegations of the bill including such discovery as was therein prayed for. No process to compel appearance was issued until after the filing of the bill or petition.

§ 698. Definition of process and summons.

The words "process" and "summons" are often used as synonymous. But they are not necessarily so. Process, as used in its broad sense, includes all writs and mandates issued in the course of a proceeding. In a strict sense, process is confined to the mandate of a court under its seal whereby a party or an officer of the court is commanded to do certain acts. Hence a summons signed by plaintiff's attorney only, is

not process[1] nor is a declaration in ejectment.[2] A summons, at common law, was a writ commanding the sheriff or other authorized officer to notify a party to appear in court to answer a complaint made against him and specified in the writ, on a day mentioned therein.[3] As thus defined, it was process. The summons of to-day is a writing issued either from a court or from an attorney, notifying defendant to appear within a certain time and answer the complaint against him.

—— **Original, mesne, and final process.** In the English law, process in civil causes is called "original" process, when it is founded upon the original writ; and also to distinguish it from mesne or intermediate process, which issues pending the suit, upon some collateral interlocutory matter, as to summon juries, witnesses, and the like. "Mesne" process is also sometimes put in contradistinction to "final" process, or process of execution; and then it signifies all process which intervenes between the beginning and end of a suit.[4] The term "original process" is often used to designate the summons.

§ 699. Nature and object of summons.

A summons is deemed the mandate of the court.[5] Its office is to bring a party into court[6] by informing the person or persons sued of the commencement of an action against him or them.

§ 700. Necessity.

A judgment may be obtained without a process or pleading, where the proceedings are arbitration proceedings under the statute,[7] where a judgment is confessed by a statement of facts and consent that judgment be entered,[8] and where there is a submission on agreed facts.[9]

[1] Cyc. Law Dict. 729; People ex rel. Johnson v. Nevins, 1 Hill, 154.
[2] Knapp v. Pults, 3 How. Pr. 53.
[3] Cyc. Law Dict. 883.
[4] 3 Bl. Comm. 279.
[5] Code Civ. Proc. § 418.
[6] Graves v. Waite, 59 N. Y. 156.
[7] Code Civ. Proc. § 2365 et seq.
[8] Code Civ. Proc. §§ 1273, 1278.
[9] Code Civ. Proc. § 1279 et seq.

§ 701. Summons as commencement of action.

A party can not be brought into court, "against his will," save by the service of summons. The service of summons is jurisdictional.[10] Prior to the adoption of the old Code civil actions in the courts of record of this state were commenced either by summons, by writ (capias ad respondendum), or by declaration. The summons was used in actions against corporations only; the capias in actions against persons not privileged from arrest; and the declaration in nearly all actions where no bail was required.[11] The Codes adopted a new rule by providing that civil actions should be commenced by a service of a summons[12] but that the court acquires a tentative jurisdiction from the time of the granting of a "provisional remedy" and has control of all subsequent proceedings, but jurisdiction so acquired is conditional and liable to be divested in a case where the jurisdiction of the court is by special provision of law made dependent on some act to be done after the granting of the provisional remedy.[13] For instance, if service of summons is required within a specified number of days after a provisional remedy, such as an attachment, is issued, the court is divested of jurisdiction if service is not made within such time.[14] As to what are provisional remedies, neither the old Code nor the present Code is explicit, except in so far as they devote a separate chapter to "general provisional remedies in an action."[15] Enumerated thereunder are proceedings for an arrest, proceedings for a temporary injunction, proceedings to attach property, proceedings for the appointment of a temporary receiver, and proceedings for a deposit and

[10] Julian v. Woolsey, 87 Hun, 326.

[11] 1 Wait's Pr. 467.

[12] Code Civ. Proc. § 416; Code Pro. § 127.

Even marine causes in the New York city court are commenced by summons. Rule 21 of Rules of City Court of New York.

[13] Code Civ. Proc. § 416.

[14] Ruser v. Union Distilling Co., 7 Misc. 396.

So where defendant dies before service of summons. Kelly v. Countryman, 15 Hun, 97.

[15] Code Civ. Proc. c. 7.

delivery or conveyance of property in certain cases. Under the old Code proceedings to replevy personal property were embraced among the provisional remedies but are now treated of in a separate chapter.[16] While the Code chapter does not state that its enumeration of provisional remedies is exclusive, the courts seem to so consider it.[17] As examples of proceedings which have been held not to grant a provisional remedy may be mentioned an order authorizing a substituted or constructive service of a summons,[18] an order for the examination of a party,[19] and the approval of an undertaking in an action of replevin.[20]

If summons is served by publication, the action is not deemed commenced until publication is completed.[21]

Filing of notice of pendency of action is not the commencement of an action except for the purpose of operating as constructive notice to purchasers, etc.[22]

§ 702. Issuance.

A summons may be said to be "issued" when it is made out and placed in the hands of a person authorized to serve it, and with a bona fide intent to have it served.[23] The "issuing" of a summons is not the commencement of an action.[24]

[16] Where a chattel is replevied before the service of the summons, the seizure thereof by the sheriff is regarded as equivalent to the granting of a provisional remedy, for the purpose of giving jurisdiction to the court, and enabling it to control the subsequent proceedings in the action; and as equivalent to the commencement of the action, for the purpose of determining, whether the plaintiff is entitled to maintain the action, or the defendant is liable thereto. Code Pro. § 1693.

[17] McCarthy v. McCarthy, 13 Hun, 579.

[18] McCarthy v. McCarthy, 13 Hun, 579.

[19] Brandon Mfg. Co. v. Pettingill, 2 Abb. N. C. 162.

[20] Nosser v. Corwin, 36 How. Pr. 540.

[21] More v. Thayer, 10 Barb. 258.

[22] Haynes v. Onderdonk, 5 Thomp. & C. 176.

[23] Mills v. Corbett, 8 How. Pr. 500.

[24] Kerr v. Mount, 28 N. Y. 659; Warner v. Warner, 6 Misc. 249.

§ 703. Contents.

The summons must contain (a) the title of the action which includes (b) the name of the court, and (c) the names of the parties, and also (d) the county in which trial is desired if the action is in the supreme court, (e) a direction to defendant to answer within a certain time under penalty of having a default entered against him, (f) the date of issuance, and (g) the subscription of the attorney with his address.[26] Under the old Code it was necessary where a copy of the complaint was not served with the summons, that the summons state where the complaint is or will be filed.[27] A notice which contains all the requirements of a summons will be effectual as such notwithstanding the fact that it contains additional matter, where the latter may be disregarded without harm to the defendant.[28]

—— **Name of court.** Under the old Code the name of the court was not required to be in the summons and it was held thereunder that a defendant on whom both summons and complaint had been served could not object that the summons did not name the court, if the complaint did.[29] The rule seems to be that while a summons which does not specify the court is not void,[30] yet it is irregular so as to be subject to be set aside unless amended.[31] The words "sup. court," it would seem, sufficiently designates the supreme court.[32]

—— **Names of parties.** The summons must contain the names of the parties to the action.[33] The true names of all the parties should be stated in full. But an error in the given name of a defendant does not prevent the court obtaining jurisdiction of his person, where he was informed, when served,

[26] Code Civ. Proc. §§ 417, 418.

[27] Code Pro. § 130.

[28] Welde v. Henderson, 10 Civ. Proc. R. (Browne) 214.

[29] Davison v. Powell, 13 How. Pr. 287; Walker v. Hubbard, 4 How. Pr. 154; Webb v. Mott, 6 How. Pr. 439; Hewitt v. Howell, 8 How. Pr. 346; Yates v. Blodgett, 8 How. Pr. 278.

[30] Tallman v. Hinman, 10 How. Pr. 89.

[31] Davison v. Powell, 13 How. Pr. 287.

[32] Walker v. Hubbard, 4 How. Pr. 154.

[33] Code Civ. Proc. § 417.

that he was the party intended to be summoned,[34] or where the original summons and the order of arrest served at the same time contain defendant's name properly spelled.[35] The given name of a defendant should not be represented by an initial though the middle name may be represented by an initial. However, the designating the given name by an initial is merely an irregularity where there is no question of the identity of the parties.[36]

If the suit is against a married woman, it is sufficient to use the word "Mrs." with the name of her husband.[37] If divorced, she should be designated by the surname acquired by marriage, unless she has resumed her former name or has acquired another name by repute.[38] But though it is insufficient to refer in the summons to a married woman merely as the wife of another defendant without even giving her last name, such defect is amendable.[39]

If a party sues or is sued in a representative capacity, the name should be "Richard Roe, as administrator of the estate of John Doe." But a failure to insert the word "as" is not fatal since an amendment may be allowed,[40] though when the word "as" is omitted, and the averments of the complaint do not show that the action is by or against parties in their representative capacity, the defect of omitting the word "as" or a description of representative character is fatal, and the addition of the word "trustee," "executor," or "assignee," etc., is merely descriptio personae. But when it appears from averments of the complaint that the action is by or against parties in their representative capacity, such a defect as the omission of the word "as" or a description of representative capacity is

[34] Stuyvesant v. Weil, 167 N. Y. 421.

[35] Holman v. Goslin, 63 App. Div. 204.

[36] But the defect is amendable. Farmers' Nat. Bank of Rome v. Williams, 9 Civ. Proc. R. (Browne) 212.

It is a mere irregularity which may be waived or disregarded as not affecting a substantial right. Grant v. Birdsall, 48 Super. Ct. (16 J. & S.) 427, 2 Civ. Proc. R. (Browne) 422; appeal dismissed 92 N. Y. 653.

[37] Weil v. Martin, 1 Civ. Proc. R. (McCarty) 133.

[38] Trebing v. Vetter, 12 Abb. N. C. 302, note.

[39] Weil v. Martin, 24 Hun, 645.

[40] Bennett v. Whitney, 94 N. Y. 302.

cured.[41] As to the test by which to determine when an action is deemed to be brought in favor of or against a party as an individual and when in favor of or against him in a representative capacity, Chief Justice Andrews has said "that the title and pleadings may be considered together to ascertain the true nature of the action, and the action will be treated as an individual or representative one, as disclosed upon an inspection of the whole record."[42] If the summons describes plaintiff in a representative or special character, plaintiff cannot declare generally in the complaint, and if he does so the proceedings will be set aside for irregularity.[43] The summons may be amended to conform to the complaint by properly describing plaintiff as a receiver.[44]

If the party who sues or is sued is a corporation, it should be referred to by the name under which it was incorporated.

The Code authorizes actions by or against unincorporated associations composed of seven or more members to be brought by or against the president or treasurer.[45] Hence it is sufficient in such cases to include the name of the association and the president or treasurer. If the summons is against a foreign corporation, but the answer sets up that defendant is a voluntary association, the summons may be amended in a proper case, by inserting the names of the members of the association as defendants.[46]

The Code provides that if plaintiff is ignorant of the name or part of the name of a defendant he may designate the defendant in the summons by a fictitious name or by as much of his name as is known, adding a description identifying the party intended.[47] The Code further provides that where plain-

[41] Beers v. Shannon, 73 N. Y. 292; Roozen v. Clonin, 13 App. Div. 190.
[42] First Nat. Bank of Amsterdam v. Shuler, 153 N. Y. 163.
[43] Blanchard v. Strait, 8 How. Pr. 83.
[44] Olney v. Goodwin, 78 State Rep. 41, 44 N. Y. Supp. 41.
[45] Code Civ. Proc. § 1919.
[46] Evoy v. Expressmen's Aid Soc., 51 State Rep. 38.
[47] Code Civ. Proc. § 451.

Plaintiff, in the summons, designated defendant as Joseph Litto, stating therein that the first name was fictitious, the real name being unknown to plaintiff, and obtained judgment by default in the action, issued execution, and arrested Frank Liatto. Held, that the arrest was unauthorized under such judgment, and that plaintiff was bound by his

tiff demands judgment against an unknown person, he may designate that person as unknown, adding a description tending to identify it.[48] But when the name, or the remainder of the name, or the person, becomes known, an order must be made by the court upon such notice and such terms as it prescribes that the proceedings already taken be deemed amended by the insertion of the true name, in place of the fictitious name or part of a name, or the designation as an unknown person; and that subsequent proceedings be taken under the true name.[49] A summons including as parties unknown owners is not invalid because adding the words "if any."[50]

The summons must be amended where new parties are brought in by amendment of the complaint.[51] Even after judgment, the court may allow an amendment inserting the name of a party in the copy summons filed.[52]

—— **Name of county in which trial is desired.** If the action is brought in the supreme court, the summons must contain the name of the county in which the plaintiff desires the trial.[53] But the words "city and county of New York," in the caption of the summons, were held a sufficient designation of the county in which the plaintiff desires the trial, before the enactment of the Greater New York charter.[54] Omission to name the county is, however, a mere irregularity which may be corrected by permission of the court,[55] as is the omission of the office address of the attorney.[55a]

position that the Christian name only was unknown to him. People ex rel. Liatto v. Dunn, 27 Misc. 71.

[48] Code Civ. Proc. § 451

[49] Code Civ. Proc. § 451.

[50] Abbott v. Curran, 98 N. Y. 665.

[51] Follower v. Laughlin, 12 Abb. Pr. 105.

[52] Van Wyck v. Hardy, 4 Abb. App. Dec. 496, 39 How. Pr. 392.

[53] Code Civ. Proc. § 417.

[54] Ward v. Sands, 10 Abb. N. C. 60.

Judge Rumsey, at page 192 of volume one of his New York practice, states that as the city of New York now includes other counties, this practice of designating the place of trial by the words "city and county of New York" has fallen into merited disuse.

[55] Wallace v. Dimmick, 24 Hun, 635, overruling Osborn v. McCloskey, 55 How. Pr. 345.

[55a] Wiggins v. Richmond, 58 How. Pr. 376.

——**Provision as to time to answer.** The summons must require defendant to serve a copy of his answer on plaintiff's attorney within twenty days after the service of summons, exclusive of the day of service.[56] But if the summons requires

[56] Code Civ. Proc. § 418.

In an action brought in the New York city court the summons must state that the time within which defendant must serve a copy of his answer is six days after the service thereof, exclusive of the day of service, except where a justice of the court grants an order for a short service in less than two days, or where an order directs service of the summons without the city of New York or by publication, in which case the summons must state that the time for service of a copy of defendant's answer is ten days. Code Civ. Proc. § 3165.

[Form of affidavit, undertaking, and order in New York city court where two days' service is desired.]

County of New York, ss.

——— of No. ——— Street in the Borough of ——— of the City of New York, being duly sworn, says, that ——— ha , as he verily believe a good cause of action against ——— arising out of ——— and ——— about to commence an action in the City Court of the City of New York, upon such cause of action against said ——— that said ——— do not reside in the City of New York, within the meaning of the Statute, but reside at ———.

That this affidavit is made for the purpose of applying for an Order that the said ——— be summoned to answer the complaint of said ——— within two days after the service of the summons, exclusive of the day of service; and that no other application has been made for the order hereby sought.

Sworn to before me this
——— day of ——— 190—.

Whereas the above named ——— about to commence an action in the City Court of the City of New York, as plaintiff against the above named ——— as defendant and ha applied for an order shortening the time to answer therein; ———. Now, therefore, ——— of No. ——— Street in ——— do ——— undertake, pursuant to the Statute, in the sum of ——— Dollars, that the plaintiff will pay any judgment which may be rendered against ——— in the action not exceeding the sum above specified.

County of New York, ss.

——— being duly sworn, doth depose and say, that he resides at No. ——— Street, in the Borough of ——— of the City of New York, and is a ——— holder therein; that he is worth twice the sum specified in the above undertaking over all the debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution.

Sworn to before me this ——— day of ——— 190—.

defendant to answer within a shorter time than allowed by the statute, it is amendable.[57]

—— **Signature.** A summons must be subscribed by the plaintiff's attorney who must add to his signature, his office address specifying the place within the state where there is a post office and if he resides in a city he must add the street and street number, if any, or suitable designation of the particular locality.[58] A "printed" subscription of the attorney's name is held sufficient.[59] A subscription of the summons by plaintiff who was not an attorney is invalid[60] as is a summons signed by an agent, as such, not an attorney, and requiring the answer to be served on himself at his residence, not that of the party.[61]

But the fact that a copy of the summons delivered does not contain the name of plaintiff's attorney is not fatal, since it is

State of New York, County of New York, ss.:

On this ——— day of ——— 190 , before me personally appeared ——— known to me to be the individual described in, and who executed the foregoing instrument, and acknowledged that he executed the same.

City Court of the City of New York.

Plaintiff

against

Defendant.

Satisfactory proof having been presented to me that the —— —— reside without the City of New York, within the meaning of the Statute, and the proper Undertaking having been given and approved: It Is Ordered, that the defendant ——— be Summoned to answer plaintiff's Complaint in the above action within two days after service of the Summons exclusive of the day of service: A copy of this Order must be delivered with a copy of the Summons.

Dated, Borough of Manhattan, New York City, ———, 190--.

(Signature)

Justice of the City Court of the City of New York.

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[57] Gribbon v. Freel, 93 N. Y. 93.

[58] Code Civ. Proc. § 417.

[59] Mutual Life Ins. Co. v. Ross, 10 Abb. Pr. 260, note; Barnard v. Heydrick, 49 Barb. 62, 2 Abb. Pr., N. S., 47, 32 How. Pr. 97; overruling Farmers' Loan & Trust Co. v. Dickson, 9 Abb. Pr. 61, 17 How. Pr. 477; City of New York v. Eisler, 2 Civ. Proc. R. (Browne) 125, 10 Daly, 396.

[60] Johnston v. Winter, 7 Alb. Law J. 135.

[61] Weir v. Slocum, 3 How. Pr. 397, which held, however, that such a summons was amendable.

only a mere irregularity,[62] and a summons signed by the firm name of attorneys may be amended, even after judgment, by substituting the individual name of one of the attorneys only.[63] So if the summons gives only the firm name of defendants, it may be amended by inserting the name of the partners.[64] Likewise, failure to add the office and post-office address of the attorney is amendable.[65]

—— **Date.** A summons should be dated as of the day when issued but the date is not so material a part of the summons as to require the setting aside of the service thereof because of a variance between the date of the original and the copy.[66] The date is amendable.[67]

—— **Seals.** A seal is not necessary where the process is issued and subscribed by the party or attorney, and not by the clerk.[68]

Form of summons.

[Name of court.]

Trial desired in the County of ——— [If in the supreme court].

Plaintiff
against
Defendant. } Summons.

To the above named Defendant:

You are hereby Summoned to answer the complaint in this action, and to serve a copy of your answer on the Plaintiff's Attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, Judgment will be taken against you by default, for the relief demanded in the complaint.

Dated, ———, 19—.

———
Plaintiff's Attorney.

Office Address: No. ——— Street,
———.[69]

[62] Hull v. Canandaigua Electric Light & Railroad Co., 55 App. Div. 419; Wiggins v. Richmond, 58 How. Pr. 376.

[63] Sluyter v. Smith, 15 Super. Ct. (2 Bosw.) 673.

[64] Bannerman v. Quackenbush, 11 Daly, 529.

[65] Wiggins v. Richmond, 58 How. Pr. 376.

[66] George v. Fitzpatrick, 25 Civ. Proc. R. (Scott) 383.

[67] George v. Fitzpatrick, 25 Civ. Proc. R. (Scott) 383.

[68] Talcott v. Rosenberg, 8 Abb. Pr., N. S., 287, 3 Daly, 203.

[69] This is the form of a summons as required by Code Civ. Proc. § 418.

Under the old Code two kinds of summons were provided for: summons "for money" and summons "for relief."[70]

§ 704. Indorsements on summons in penal actions.

The Code requires a summons in an action by a private person for a penalty or forfeiture given by statute, to be indorsed with a reference to the statute, unless the complaint is served.[71] The purpose of this section is to prevent fraud and imposition by informing defendant of the nature of the cause of action against him. It will be observed (a) that the cause of action must be one created by statute[72] and (b) that there is no necessity for indorsement where the complaint is served with the summons,[73] or where the suit is commenced other than by summons.[74] This rule applies to an action brought on a municipal ordinance.[75] It applies to an action brought in the name of the people as well as to an action by a private person.[76] But it does not apply to actions for damages in which penalties are only incidental to the recovery.[77]

—— **Necessity of "indorsement."** It is held that reference to the statute may be made in the body of the summons instead of being endorsed thereon,[78] though such a rule seems to utterly disregard the words of the statute.

—— **Sufficiency.** If the endorsement on the summons clearly informs defendant of the character of the action or conveys such information as would necessarily be given by a complaint, if

[70] Code Pro. § 129.

[71] Code Civ. Proc. § 1897.

[72] Sprague v. Irwin, 27 How. Pr. 51.

[73] Cox v. New York Cent. & H. R. R. Co., 61 Barb. 615; People v. Bull, 42 Super. Ct. (10 J. & S.) 19.

[74] Thayer v. Lewis, 4 Denio, 269.

[75] City of New York v. Eisler, 2 Civ. Proc. R. (Browne) 125, 10 Daly, 396.

[76] People v. O'Neil, 54 Hun, 610, 28 State Rep. 37; disapproving Townsend v. Hopkins, 9 Civ. Proc. R. (Browne) 257.

[77] Layton v. McConnell, 61 App. Div. 447.

[78] Schoonmaker v. Brooks, 24 Hun, 553; following, but disapproving, Cox v. New York Cent. & H. R. R. Co., 61 Barb. 615; People v. Bull, 42 Super. Ct. (10 J. & S.) 19.

served,[79] it is sufficient. Hence where an endorsement referred to the statute and section imposing the penalty, omitting to refer to an amendatory statute, giving the officer who was plaintiff the right to sue, it was held sufficient.[80] The endorsement must be more specific, however, than was required under the old statutes.[81] It must, if penalties or forfeitures are given in different sections of the act, refer to the section.[82] The endorsement is not insufficient because it refers not only to certain sections of a specified statute but also to "the acts amendatory thereof."[83] Nor is it bad because it refers to more than one section of the statute where causes of action for violation of two sections may be properly joined in one complaint.[84]

[79] Prussia v. Guenther, 16 Abb. N. C. 230.

A reference to "section 19, c. 16, tit. 1, pt. 1, of the several statutes relating to overseers of highways and highway labor" is bad, because it does not refer to any specific statute. Hitchman v. Baxter, 34 Hun, 271.

[80] Prussia v. Guenther, 16 Abb. N. C. 230.

[81] 2 Rev. St. 481, § 7, as existing before the Codes, required the indorsement of a general reference to the statute by which such action is given in the following form: "according to the provisions of the statute regulating the rate of interest on money," or "according to the provisions of the statute concerning sheriffs," as the case might require, or in some other general terms referring to the statute.

Under this statute, it was held that an indorsement in these words: "Issued according to the provisions of the statute concerning incorporation of turnpike and plank-road companies, and the collection of penalties for demanding and recovering more than lawful toll in passing through toll gates on such roads" was sufficient (Marselis v. Seaman, 21 Barb. 319). Such an indorsement would not, it seems, be sufficient under the present statute.

[82] Code Civ. Proc. § 1897.

[83] Ripley v. McCann, 34 Hun, 112. But see Young v. Gregg, 9 Civ. Proc. R. (Browne) 262.

[84] A summons indorsed, "This summons is issued to collect penalties for violations of sections 13 and 14 of the act to suppress intemperance and to regulate the sale of intoxicating liquors, passed April 16, 1857, and the acts amendatory thereof, November 24, 1880. N. B. Packard, justice of the peace," is sufficient. Ripley v. McCann, 34 Hun, 112; Overseers of Poor v. McCann, 20 Wkly. Dig. 114.

—— Form of indorsement.

[Indorse on copy of summons served.]

According to the provisions of ———, chapter ———, section ———, entitled ——— and contained in Revised Statutes N. Y., ——— edition, page ———, section ———.

—— **Effect of failure to indorse.** Failure to indorse a reference to the statute under which the action is brought is cured by defendant's appearing and answering without objection,[85] though it would seem that as the defect does not appear on the face of the summons, the failure is not remedied by defendant's mere voluntary appearance[86] and that he may thereafter move to set aside the service of the summons although the statute of limitations has meantime run against the claim and though defendant, after the service of the summons, was actually informed of the nature of the action.[87] A judgment by default is not void because the summons was not properly indorsed, though reversible on appeal.[88]

§ 705. Indorsement on summons in matrimonial actions.

The Code provides that in a matrimonial action judgment by default cannot be rendered unless either the summons and a copy of the complaint are personally served on defendant, or a copy of the summons delivered to defendant, contains on its face either the words "Action to annul a marriage," "Action for a divorce," or "Action for a separation," according to the article of the Code title under which the action is brought.[89] This Code provision was enacted to prevent fraud and hence is satisfied where the indorsement on the summons clearly informs defendant of the character of the action commenced against him. It follows that the indorsement of the words "Action for a divorce," when the action is only for a separa-

[85] Vernon v. Palmer, 48 Super. Ct. (16 J. & S.) 231; Mulkins v. Clark, 3 How. Pr. 27; Sprague v. Irwin, 27 How. Pr. 51; Bissell v. New York Cent. & H. R. R. Co., 67 Barb. 385.

[86] Lassen v. Aronson, 29 Abb. N. C. 114.

[87] Farmers' & Merchants' State Bank v. Stringer, 75 App. Div. 127.

[88] Spoor v. Cornell, 12 Civ. Proc. R. (Browne) 319.

[89] Code Civ. Proc. § 1774.

tion, is sufficient.[90] Furthermore, if the original summons is properly indorsed the fact that the copy served is not so indorsed, does not render the summons a nullity so as to preclude an amendment thereof and prevent an application for alimony or invalidate an order of arrest granted therein, though such a failure does prevent the entry of a judgment by default.[91]

§ 706. Supplemental summons.

When the court directs a new defendant to be brought in, and the order is not made on his own application, a supplemental summons must be issued, directed to him, and in the same form as an original summons except that it must require him to answer the amended or supplemental complaint, as the case may be.[92]

§ 706a. Filing summons.

The summons must be filed with the clerk, by the party in whose behalf it is served, within ten days after the service thereof. If the party fails to so file it, the adverse party, on proof of the failure, is entitled, without notice, to an order from a judge, that it be filed within a time specified in the order, or be deemed abandoned.[93]

[90] Rudolph v. Rudolph, 34 State Rep. 1, 19 Civ. Proc. R. (Browne) 424, 12 N. Y. Supp. 81.

[91] Sears v. Sears, 9 Civ. Proc. R. (Browne) 432.

[92] Code Civ. Proc. § 453; Organ v. Wall, 19 Hun, 184.

The order must not be made on the new party's own application. Haas v. Craighead, 19 Hun, 396.

[93] Code Civ. Proc. § 824.

CHAPTER II.

PERSONAL SERVICE OF SUMMONS.

ART. I. THE STATUTES.

§ 707. The Code provides quite fully as to the method of serving the summons[1] and such provisions apply equally well to the service of any process or other paper whereby a special proceeding is commenced in a court or before an officer, except a proceeding to punish for contempt and except where special provision for the service thereof is otherwise made by law.[2]

ART. II. SERVICE OF COMPLAINT OR NOTICE WITH SUMMONS.

§ 708. Service of notice with summons.

If a copy of the complaint is not served with the summons, plaintiff cannot take judgment by default without application to the court, where the defendant does not appear.[3] There is one exception, however, to this rule. If the cause or causes of action consist (a) of the breach of an express contract to pay, absolutely or on a contingency, a sum or sums fixed by the terms of the contract or capable of being ascertained therefrom by mere computation, or (b) a breach of an express or implied contract to pay money received or disbursed, or the value of the property delivered, or of service rendered by, to, or for the use of, the defendant or a third person, where a money judgment only is demanded; then if plaintiff serves with his summons a

[1] Code Civ. Proc. § 419 et seq.
[2] Code Civ. Proc. § 433.
[3] Code Civ. Proc. § 419.

notice stating the sum of money for which judgment will be taken, no application to the court is necessary in case of default and where defendant does not appear.[4] This exception is substituted for the phrase contained in the old Code "an action arising on contract for the recovery of money only."[5] The class of actions embraced in this exception correspond to the common law action of assumpsit, embracing general and special assumpsit. It includes actions where the clerk can assess damages, such as an action by a principal to recover from his agent moneys collected by the latter as agent,[6] actions on a quantum meruit,[7] etc. The exception does not apply to an action for conversion,[8] an action against a carrier for loss of goods,[9] or an action in which part of the relief sought is unliquidated damages for breach of an agreement to carry on business.[10] If the summons is accompanied by a complaint they are not to be set aside because the notice in the summons is in the wrong form.[11]

The effect of the notice relates merely to the mode of taking judgment by default. It does not require the complaint to conform thereto, under penalty of having the complaint stricken out on motion.[12]

The amount demanded in the summons may be increased by amendment,[13] but only by application to the court and upon notice.[14]

[4] Code Civ. Proc. § 420.

[5] Code Pro. § 129.

[6] Steamship Richmond Hill Co. v. Seager, 31 App. Div. 288.

[7] Champlin v. Deitz, 37 How. Pr. 214.

[8] Horton v. La Due, 59 How. Pr. 454.

[9] Clor v. Mallory, 1 Code R. 126.

[10] Tuttle v. Smith, 6 Abb. Pr. 329, 14 How. Pr. 395.

For further illustrations of what were considered actions arising on contracts for the recovery of money only within that phrase as used in the old Code, see 11 Abb. Cyc. Dig. 244, 245.

[11] McCoun v. New York Cent. & H. R. R. Co., 50 N. Y. 176; Abbott v. New York Cent. & H. R. R. Co., 12 Abb. Pr., N. S., 465.

[12] Sharp v. Clapp, 15 App. Div. 445.

[13] Weare v. Slocum, 1 Code R. 105, 3 How. Pr. 397; Farmers' Loan & Trust Co. v. Dickson, 17 How. Pr. 477, 9 Abb. Pr. 61.

[14] Cassidy v. Boyland, 18 State Rep. 338, 15 Civ. Proc. R. 320.

—— Form of notice.

[This notice may immediately follow the summons or be indorsed on the back.]

NOTICE.—Take notice, that upon your default to appear or answer the above (or within) Summons, Judgment will be taken against you for the sum of ——— dollars, with interest from ——— and with costs of this action.

————, Plaintiff's Attorney.

[If indorsed on the back commence with the words "To the defendant."]

§ 709. Service of complaint with summons.

A defendant on whom plaintiff has served with the summons a copy of the complaint, must serve a copy of his demurrer or answer on the plaintiff's attorney before the expiration of the time within which the summons requires him to answer.[15] If a copy of the complaint is not served on the defendant within twenty days, a notice of appearance entitles defendant only to notice of the subsequent proceedings, unless within the same time he demands the service of a copy of the complaint.[16]

§ 710. Notice of no personal claim.

Where a personal claim is not made against a defendant there may be served with the summons, a notice subscribed by plaintiff's attorney, setting forth the general object of the action, a brief description of the property affected by it, if it affects specific real or personal property, and that a personal claim is not made against him. The purpose of serving such a notice is to

[15] Code Civ. Proc. § 422.

In an action brought in a justice's court of the city of Brooklyn or in a district court of the city of New York, which is now the municipal court of the city of New York or in the justice court of the city of Albany or Troy, to recover on or for the breach of a contract, express or implied, plaintiff may serve on defendant with the summons and in like manner, a copy of a written complaint, verified in like manner as a verified pleading in the supreme court, whereupon a judgment by default may be taken without proof, where defendant files no verified answer in writing. Code Civ. Proc. §§ 3126, 3207.

[16] Code Civ. Proc. § 422.

obtain costs against a defendant so served who unreasonably defends the action, and to prevent an allowance of costs being made to such party.[17]

—— Form of notice.

[To follow summons.] [If separate, add title of court and action.]

To the defendant:

The object of the above entitled action, wherein a summons is herewith served upon you, is to foreclose ——— mortgage ——— bearing date ———, 190—, executed by ——— to ——— to secure ——— dollars which sum, with interest from ———. 190—, is now due and unpaid thereon.

Said mortgage was recorded in the office of the ——— of the ——— County of ——— on the ——— day of ———, 190—. in Liber No. ——— of Mortgages at page ———. The plaintiff make no personal claim against you in this action.

The following is a description of the premises affected by this action: [Describe premises as in complaint.]

ART. III. PERSONS EXEMPT FROM SERVICE.

§ 711. Parties and witnesses.

A non-resident party to an action as well as a non-resident witness is privileged from service of summons while without the jurisdiction of his residence for the purpose of attending court in the action to which he is a party or in which he is sworn as a witness.[18] This exemption is a privilege accorded by the common law[19] to "parties and witnesses"[20] while coming to, remaining at, and returning from, court,[21] together with a reasonable opportunity to return home. The privilege extended, at first, only to witnesses[22] and even now is not extended, in relation to parties, beyond the real parties in interest, whether or not nominal, to the action or proceedings attended upon.[23]

It would seem that this rule applies not only where a non-resident of the state comes into this state but also where a

17 Code Civ. Proc. § 423.

18 Parker v. Marco, 136 N. Y. 585.

19 Parker v. Marco, 136 N. Y. 585, 589.

20 A person attending the taking of depositions cannot claim the exemption where he is not a party. Michaels v. Hain, 78 Hun, 500.

21 Person v. Grier, 66 N. Y. 124.

22 Michaels v. Hain, 78 Hun, 500.

23 Michaels v. Hain, 78 Hun, 500.

resident of the state but not living in the jurisdiction of a court of limited territorial jurisdiction, such as a city court of record, comes within such jurisdiction.[24]

This privilege of a party extends not only to trials but also to protect a party appearing on the examination of his adversary's witnesses before a notary public in this state where the testimony taken is to be read on the trial of an action in a federal circuit court for another state.[25] Likewise, attendance on bankruptcy proceedings as a party, witness or attorney confers immunity.[26]

A non-resident witness is exempt though he attends voluntarily instead of in pursuance of a subpoena[27] and the attendance need not be on a trial before a court.[28] A "domicile" elsewhere is not essential to the privilege and hence where a resident of this state is sojourning in another state but comes here to testify before his journey is finished, he is privileged.[29] Non-residence and not citizenship is the test of immunity.[30] But coming into the jurisdiction on private business and then being subpoenaed as a witness does not confer immunity.[31] The immunity extended a non-resident witness includes service on him as an agent or officer, such as a director of a corporation.[32] It also covers service of summons in which the witness is named as trustee, administrator or executor.[33]

But service of process may be made on non-residents within the state as witnesses, where their immunity from service is waived, as where one of several directors said to serve the sum-

[24] Sebring v. Stryker, 10 Misc. 289; Pritsch v. Schlicht, 5 State Rep. 871.

[25] Parker v. Marco, 136 N. Y. 585.

[26] Matthews v. Tufts, 87 N. Y. 568.

[27] Brett v. Brown, 13 Abb. Pr., N. S., 295.

[28] Attendance before arbitrators (Sanford v. Chase, 3 Cow. 381) or a senate committee (Thorp v. Adams, 33 State Rep. 797) is sufficient.

[29] Thorp v. Adams, 33 State Rep. 797, 19 Civ. Proc. R. (Browne) 351, 11 N. Y. Supp. 479.

[30] Hollender v. Hall, 33 State Rep. 848, 19 Civ. Proc. R. (Browne) 292.

[31] Cohn v. Kaufmann, N. Y. Daily Reg., April 30, 1884.

[32] Sheehan v. Bradford, B. & K. R. Co., 15 Civ. Proc. R. (Browne) 429; Sizer v. Hampton & B. Railway & Lumber Co., 57 App. Div. 390.

[33] Grafton v. Weeks, 7 Daly, 523.

mons on a named person because he was vice-president of the corporation which was sued.[34]

—— **Duration of immunity.** The right to claim exemption is forfeited by unreasonable delay in returning home after the termination of the proceedings.[35] What is "unreasonable delay" may depend somewhat on the distance of the place of residence from the place of attendance in this state.[36]

—— **Waiver of right to insist on privilege.** The privilege is a personal one which must be asserted at the first opportunity[37] before the time to answer has expired[38] and before the party or witness performs any act in the cause relating to his appearance or defense. Thus, a general appearance[39] or service of notice of retainer and demand of copy of complaint[40] waives the right to insist on the privilege though the rule is otherwise where proceedings are taken merely to dismiss the summons and stay proceedings.[41]

§ 712. Foreign representatives.

A minister of a foreign government duly accredited to another foreign country, and recognized as such by the govern-

[34] Weston v. Citizens' Nat. Bank, 64 App. Div. 145.

[35] Sizer v. Hampton & B. Railroad Lumber Co., 57 App. Div. 390; Finch v. Galigher, 25 Abb. N. C. 404; Woodruff v. Austin, 15 Misc. 450, 72 State Rep. 174; Marks v. La Societe Anonyme, De L'Union Des Papeteries, 22 Civ. Proc. R. (Browne) 201, 46 State Rep. 660; Pope v. Negus, 14 Civ. Proc. R. (Browne) 406: held that staying after adjournment of case on calendar until usual adjournment of court was not an unreasonable delay.

For further illustrations of what is not an unreasonable delay, see Sallinger v. Adler, 25 Super. Ct. (2 Rob.) 704; Merrill v. George, 23 How. Pr. 331.

[36] Cake v. Haight, 30 Misc. 386, 7 Ann. Cas. 329, which held that a sojourner in Jersey City did not return without unreasonable delay where, the case not being called, he remained until after seven in the evening.

[37] Sebring v. Stryker, 10 Misc. 289, 63 State Rep. 243, 24 Civ. Proc. R. (Scott) 126.

[38] Lederer v. Adams, 33 State Rep. 799, 19 Civ. Proc. R. (Browne) 294, 11 N. Y. Supp. 481.

[39] Brett v. Brown, 13 Abb. Pr., N. S., 295.

[40] Stewart v. Howard, 15 Barb. 26.

[41] Brett v. Brown, 13 Abb. Pr., N. S., 295.

ment of the United States, is, while in this state, awaiting means to convey him to his destination, exempt from service of summons.[42]

§ 713. Person in custody.

A person in custody on a criminal charge may, before or after conviction, be served with summons.[43]

ART. IV. TIME, PLACE, AND MANNER OF SERVICE.

§ 714. Time of service.

The plaintiff's attorney may, by an indorsement on the summons, fix a time within which the service thereof must be made which will preclude a valid service after such time.[44] Where a summons is delivered for service to the sheriff of the county wherein the defendant is found, the sheriff must serve it and return it with proof of service to the plaintiff's attorney with reasonable diligence.[45] When process has once become functus officio, there is no resurrection short of a new exercise of official power.[46]

—— **Sunday.** A summons cannot be issued or served on Sunday, unless accompanied by an injunction order and an order of a justice of the supreme court who granted the injunction order, permitting service on that day.[47]

—— **Legal holiday.** Service of a summons on a legal holiday is sufficient.[48] This includes Christmas day[49] and the Fourth of July.[50] So, it would seem, service may be made on Saturday afternoon, notwithstanding the Saturday half-holiday statute.[51]

42 Wilson v. Blanco, 14 State Rep. 866.

43 Slade v. Joseph, 5 Daly, 187; Davis v. Duffie, 3 Keyes, 606.
See, also, Code Civ. Proc. §§ 131, 132.

44 Code Civ. Proc. § 425.

45 Code Civ. Proc. § 425.

46 People ex rel. Roberts v. Bowe, 81 N. Y. 43.

47 Code Civ. Proc. § 6; Scott Shoe Machinery Co. v. Dancel, 63 App. Div. 172.

48 Flynn v. Union Surety & Guaranty Co., 170 N. Y. 145.

49 Didsbury v. Van Tassell, 56 Hun, 423, 18 Civ. Proc. R. (Browne) 372, 31 State Rep. 204.

50 Slater v. Jackson, 25 Misc. 783.

51 See Nichols v. Kelsey, 20 Abb. N. C. 14.

Formerly service on election day was void but the statute does not now so provide.

§ 715. Place of service.

Summons cannot be served without the jurisdiction, and courts of one state cannot acquire jurisdiction over the citizens of another state under statutes which authorize a substituted service, or which provide for actual service of notice without the jurisdiction so as to authorize a judgment in personam against the party proceeded against.[52] Jurisdiction of the person is not obtained by the attachment of property.[53] The seeming exception to this rule, in so far as the statute authorizes service by mailing or publication, will be considered in subsequent sections.[54] In the New York city court, special rules apply.[55]

§ 716. Who may serve.

The summons may be served by any person other than a party to the action, except where it is otherwise specially prescribed by law[56] as in an action by a private person to recover the amount of a penalty or forfeiture, where the summons can be served only by an officer authorized by law to collect an execution issued out of the same court.[57] And the service of a summons by a party is a mere irregularity which does not make

[52] Jones v. Jones, 108 N. Y. 415; Pierson v. Fries, 3 App. Div. 418; Burton v. Burton, 45 Hun, 68.

[53] Capital City Bank v. Parent, 134 N. Y. 527.

[54] See post, §§ 734-756.

[55] In the New York city court an order directing the service of a summons, either without the city of New York or by publication may be granted by the court or by a justice thereof, but only where a warrant of attachment has been issued and personal service of the summons cannot be made with due diligence within the city. Code Civ. Proc. § 3170.

[56] Code Civ. Proc. § 425.

[57] Code Civ. Proc. § 1895.

This rule does not apply, however, to an action brought under L. 1857, c. 185, against a railroad company, for a penalty for charging more than legal rate of fare. Quade v. New York, N. H. & H. R. Co., 39 State Rep. 157, 59 Super. Ct. (27 J. & S.) 479.

the proceeding void.[58] The person serving the summons must be at least eighteen years of age.[59] If the sheriff is a party to the action, he can not serve the summons but service may be made by the coroner.[60]

§ 717. Mode of service.

Service should be made by delivering a copy of the summons to the person to be served, informing him of the nature of the paper, and leaving the copy with the person served.[61] Service on the wrong person by mistake followed by his delivering the paper to defendant is not sufficient.[62] Nor is the failure to personally serve an infant, cured by the appointment of a guardian ad litem.[63] It is not sufficient to go into the room where the person is, lay the summons and complaint on a chair, and then depart without asking for defendant by name or offering to deliver them into his hands.[64] So mere manual delivery of the summons and complaint, defendant returning them without being informed he is entitled to keep them, is not sufficient.[65] Putting the summons into defendant's possession, enveloped to conceal the knowledge it should communicate, is not a good service, though he subsequently discovers it when beyond the limits of the state.[66] A private person cannot serve process by wrongfully entering the house of the person served.[67]

—— **Where party is unwilling to accept.** If a party will not accept papers, the officers should inform him of their nature and of his purpose, and lay them down in his presence.[68] After

[58] Losey v. Stanley, 83 Hun, 420, 64 State Rep. 746.

[59] Rule 18 of General Rules of Practice.

[60] Code Civ. Proc. § 172.

[61] Rule 18 of General Rules of Practice.

[62] Williams v. Van Valkenburg, 16 How. Pr. 144.

[63] Hogle v. Hogle, 49 Hun, 313, 17 State Rep. 580; Crouter v. Crouter, 133 N. Y. 55.

[64] Correll v. Granget, 12 Misc. 209, 67 State Rep. 892.

[65] Beekman v. Cutler, 2 Code R. 51; Niles v. Vanderzee, 14 How. Pr. 547.

[66] Bulkley v. Bulkley, 6 Abb. Pr. 307.

[67] Mason v. Libbey, 1 Abb. N. C. 354.

[68] Davison v. Baker, 24 How. Pr. 39; Correll v. Granget, 12 Misc, 209, 67 State Rep. 892.

refusal to accept service the placing of the summons with other papers upon defendant's shoulder whence he brushed them to the floor, has been held sufficient service.[69] So, where there is an effort to avoid service, the throwing of the process into the hall by the process server, on being refused admission, the paper falling near defendant and his attention being called to it, seems to be sufficient.[70]

—— **Duties of sheriff in serving process.** As before stated a summons is deemed the mandate of the court.[71] Hence the Code provisions relating to execution of civil mandates generally[72] are applicable. The statute provides that a sheriff to whom a mandate is delivered to be executed must give to the person who delivers it to him, if required, a minute in writing signed by him specifying the names of the parties, the general nature of the mandate, and the day and hour of receiving the same.[73] It further provides that a sheriff or other officer serving a mandate must, on the request of the person served, deliver to him a copy thereof, without compensation.[74]

§ 718. Revival of service after withdrawal.

Service can not be revived after withdrawal by notice accompanied by a return of the summons, except by permission of the court.[75]

§ 719. Service by artifice on nonresident of territorial jurisdiction of court.

Personal service of a summons is insufficient and will be set aside where procured by fraud or collusion[76] as where a party is enticed within the jurisdiction by a false statement or a fraud-

[69] Martin v. Raffin, 2 Misc. 588, 51 State Rep. 145, 23 Civ. Proc. R. (Browne) 59, 21 N. Y. Supp. 1043.

[70] Wright v. Bennett, 30 Abb. N. C. 65, note.

[71] Code Civ. Proc. § 418.

[72] Code Civ. Proc. §§ 100-103.

[73] Code Civ. Proc. § 100.

[74] Code Civ. Proc. § 101.

[75] Lyster v. Pearson, 7 Misc. 98, 57 State Rep. 97.

[76] For note on service of process by artifice on nonresident, see 8 Ann. Cas. 404.

ulent pretense so that he can be served with summons.[77] It should be observed, however, that if third persons, not connected with plaintiff procure defendant to come within the jurisdiction, even by improper methods, the plaintiff has the right to avail himself of the opportunity of serving the summons.[78] So one brought within the jurisdiction by extradition process may be served with summons in a civil action at the suit of one not connected with the device by which he was brought within the jurisdiction.[79] So service upon a person at Castle Garden, where he has been obliged to land on his arrival in this country, in accordance with federal laws, is not service obtained by fraud or duress so as to justify setting it aside.[80]

In a late case, where the facts were that the creditor of a foreign corporation had invited its president to come into this state to talk over the claim and at the first meeting the latter was served with summons in the creditor's action, it was held that, conceding there was no scheme or device to obtain service of process, good faith required a reasonable opportunity to be afforded the president, after the termination of the negotiations, to leave the city and state, before any attempt was made to serve a summons.[81]

Furthermore, if a party comes into this state voluntarily and submits to service under an agreement that the trial shall

[77] Beacom v. Rogers, 79 Hun, 220; Metcalf v. Clark, 41 Barb. 45; Carpenter v. Spooner, 4 Super. Ct. (2 Sandf.) 717. So where the attorney's clerk notified defendant that he would meet him at a specified time and place within the jurisdiction, and on his attending, supposing some one desired a business interview, the summons was served (Wyckoff v. Packard, 20 Abb. N. C. 420) or where defendant was induced to come within the jurisdiction by a letter from defendant requesting an interview. Dunham v. Cressy, 21 State Rep. 266. To same effect see Allen v. Wharton, 36 State Rep. 558, 20 Civ. Proc. R. (Browne) 121, 13 N. Y. Supp. 38.

[78] Steiger v. Bonn, 59 How. Pr. 496.

[79] Lagrave's Case, 14 Abb. Pr., N. S., 333, note, 45 How. Pr. 301.

To same effect, see Martin v. Woodhall, 21 State Rep. 465, 56 Super. Ct. (24 J. & S.) 439; explaining Snelling v. Watrous, 2 Paige, 314; Carpenter v. Spooner, 4 Super. Ct. (2 Sandf.) 716, 2 Code Rep. 140.

[80] Ziporkes v. Chmelniker, 15 State Rep. 215.

[81] Olean St. Ry. Co. v. Fairmount Const. Co., 55 App. Div. 292, 8 Ann. Cas. 404.

take place at once, the service is properly set aside where plaintiff delays the trial.[82]

ART. V. PERSON ON WHOM SERVICE MAY BE MADE.

§ 720. Service on a natural person.

The Code expressly enumerates the person or persons on whom service may be made where a defendant is under disability or is a sheriff.[83] In all other cases, personal service on a natural person must be on the person himself.[84]

—— **Infant.** Personal service of summons on an infant "under" the age of fourteen years, must be made by delivering a copy thereof within the state to the infant in person and also to his father, mother or guardian, or if there is none within the state, to the person having the care and control of him, or with whom he resides, or in whose service he is employed.[85] If the infant is over fourteen service on him alone is sufficient except as hereinafter provided.[86]

—— **Person adjudged incompetent.** Personal service of summons on a defendant who has been judicially declared to be incompetent to manage his affairs in consequence of lunacy, idiocy or habitual drunkenness, and for whom a committee has been appointed, must be made by delivering a copy thereof within the state to the committee and also to the defendant in person.[87] The committee can not be served, however, until leave is obtained to sue them.[88]

But where defendant has been judicially declared to be incompetent to manage his affairs, in consequence of lunacy, and it appears satisfactorily to the court, by affidavit, that the delivery of a copy of the summons to him, in person, will tend to aggravate his disorder, or to lessen the probability of his recovery, the court may make an order, dispensing with such delivery. In that case, a delivery of a copy of the summons, to a

[82] Graves v. Graham, 19 Misc. 618.
[83] Code Civ. Proc. § 426.
[84] Code Civ. Proc. § 426, subd. 4.
[85] Code Civ. Proc. § 426, subd. 1.
[86] See post, p. 739.
[87] Code Civ. Proc. § 426, subd. 2.
[88] Smith v. Keteltas, 27 App. Div. 279; Matter of Delahunty, 28 Abb. N. C. 245.

committee duly appointed for him, is sufficient personal service upon defendant.[89]

Furthermore, at any stage of the action, the court may, if the defendant is a person judicially declared to be incompetent to manage his affairs, appoint a special guardian ad litem to conduct the defense for the incompetent defendant to the exclusion of the committee and with the same powers and subject to the same liabilities as a committee of the property.[90] But a guardian ad litem can not be appointed until after summons is served on both the committee and the lunatic and summons cannot be served until leave so to do has been obtained from the court.[91]

—— **Code rule relating to both infants and incompetents.** If the defendant is an infant of the age of fourteen years, or upwards, or if the court has, in its opinion, reasonable ground to believe, that the defendant, by reason of habitual drunkenness, or for any other cause, is mentally incapable adequately to protect his rights, although not judicially declared to be incompetent to manage his affairs, the court may, in its discretion, with or without an application therefor, and in the defendant's interest, make an order, requiring a copy of the summons to be also delivered, in behalf of the defendant, to a person designated in the order, and that service of the summons shall not be deemed complete, until it is so delivered.[92] It will be observed that this statutory provision is not mandatory but leaves the appointment to the discretion of the court.[93] Likewise where defendant is an infant under fourteen or is a person judicially declared incompetent to manage his affairs and the court has, in its opinion, reasonable ground to believe that the interest of the person, other than the defendant, to whom a copy of the summons has been delivered, is adverse to that of the defendant, or that, for any reason he is not a fit person to protect the rights of the defendant, it may make such an order.[94]

[89] Code Civ. Proc. § 429.
[90] Code Civ. Proc. § 428.
[91] Smith v. Keteltas, 27 App. Div. 279.
[92] Code Civ. Proc. § 427.
[93] Moulton v. Moulton, 47 Hun, 606.
[94] Code Civ. Proc. § 428.

Service on an infant under fourteen, alone, or on one of the persons specified, is insufficient,[95] though a guardian ad litem was appointed and he answered.[96] But the service on the infant may be constructive as well as actual, and hence service may be made on his guardian ad litem.[97]

—— **Married women.** The early cases held that service on a husband was a sufficient service on the wife unless relief was sought against her separate property,[98] but such rule is not in force now since the enactment of the married women's act.[99]

—— **Sheriffs.** Personal service of summons in an action against a sheriff for an escape must be made by delivering it to the defendant in person, or to his undersheriff in person, or at the office of the sheriff during the hours when it is required by law to be kept open, to a deputy sheriff or a clerk in the employment of the sheriff or other person in charge of the office.[100]

§ 721. Person designated by resident during his absence from state.

A resident of the state, of full age, may execute, under his hand, and acknowledge, in the manner required by law to entitle a deed to be recorded, a written designation of another resident of the state, as a person upon whom to serve a summons, or any process or other paper for the commencement of a civil special proceeding, in any court or before any officer, dur-

[95] Ingersoll v. Mangam, 84 N. Y. 622.

[96] Bellamy v. Guhl, 62 How. Pr. 460; Hogle v. Hogle, 49 Hun, 313; Crouter v. Crouter, 133 N. Y. 55.

[97] Smith v. Reid, 134 N. Y. 568.

[98] Lathrop v. Heacock, 4 Lans. 1; Watson v. Church, 3 Hun, 80.

[99] Taggart v. Rogers, 49 Hun, 265.

This case seems to be inferentially supported by Feitner v. Lewis, 119 N. Y. 131 which, however, held the contrary but was decided under the rules of the old chancery practice.

[100] Code Civ. Proc. § 426, subd. 3, which seems to be the result of the rule laid down in Sherman v. Conner, 16 Abb. Pr., N. S., 396. See, also, Didsbury v. Van Tassell, 56 Hun, 423, 18 Civ. Proc. R. (Browne) 372, 31 State Rep. 204.

Delivery to a deputy in charge of the sheriff's office is good service on the sheriff, although the sheriff has omitted to file a notice of the place of his office with the county clerk. Dunford v. Weaver, 84 N. Y. 445.

ing the absence from the state of New York of the person making the designation; and may file the same, with the written consent of the person designated, executed and acknowledged in the same manner, in the office of the clerk of the county, where the person making the designation resides. The designation must specify the occupation or other proper addition, and the residence of the person making it, and also of the person designated; and it remains in force during the period specified therein, if any; or, if no period is specified for that purpose, for three years after the filing thereof. But it is revoked earlier, by the death or legal incompetency of either of the parties thereto; or by the filing of a revocation thereof, or of the consent, executed and acknowledged in like manner. The clerk must file and record such a designation, consent, or revocation; and must note upon the record of the original designation, the filing and recording of a revocation. While the designation remains in force, a summons, or any process or other paper for the commencement of a civil special proceeding, against the person making it, in any court or before any officer, may be served upon the person so designated, in like manner and with like effect, as if it was served personally upon the person making the designation, notwithstanding the return of the latter to the state of New York.[101] Prior to 1899, the person had to go outside the United States to make the designation effective[102] but at that time the words "United States" were changed by amendment so as to read "state of New York."[103] The designation must be accompanied by his written consent to receive service, and its mere delivery to the person named with instructions not to use it till notified has no effect.[104] But the fact that the designation is invalid as a statutory designation, does not prevent its being effective as a common law power of attorney.[105]

101 Code Civ. Proc. § 430.
102 Lyster v. Pearson, 7 Misc. 98, 57 State Rep. 97.
103 L. 1899, c. 524.
104 Lyster v. Pearson, 7 Misc. 98, 57 State Rep. 97.
105 Lyster v. Pearson, 7 Misc. 98, 57 State Rep. 97.

§ 722. Domestic private corporation.

Personal service of summons on a private domestic corporation must be made by delivering a copy thereof within the state to the president or other head of the corporation, the secretary or clerk, the cashier, treasurer or a director or managing agent.[106] Service upon an assistant treasurer is not sufficient[107] but it would seem that a trustee of a religious corporation may be considered a director.[108] This Code provision is clear except as to the phrase "managing agent." Service may be made on a "managing agent" irrespective of ability to serve other officers and in this respect the rule differs from the rule authorizing service on the "managing agent" of a foreign corporation, in certain instances. It would seem that a person who would be held a managing agent of a foreign corporation would not necessarily be held a managing agent of a domestic corporation. The managing agent, upon whom process against a domestic corporation may be served, need not have the entire charge or control of the corporation or of its business,[109] though he must be a person having an independent discretionary control in the locality where his duties are performed.[110] Service on a superintendent in charge of a particular department is sufficient.[111] It has been said that a service is sufficient if on an agent or officer of such a character and rank in the company as will render it reasonably certain that the corporation will be apprised of the service of the summons,[112] but it is submitted that this test is too difficult of application to be of any practical use.[113]

[106] Code Civ. Proc. § 431.

[107] Winslow v. Staten Island Rapid Transit R. Co., 51 Hun, 298, 21 State Rep. 87, 4 N. Y. Supp. 169.

[108] Tom v. First Soc. of M. E. Church of Riga, 19 Wend. 24.

[109] Barrett v. American Telephone & Telegraph Co., 56 Hun, 430, 18 Civ. Proc. R. (Browne) 363, 31 State Rep. 465.

[110] Ruland v. Canfield Pub. Co., 18 Civ. Proc. R. (Browne) 282.

[111] Barrett v. American Telephone & Telegraph Co., 56 Hun, 430, 18 Civ. Proc. R. (Browne) 363, 31 State Rep. 465; judgment affirmed 138 N. Y. 491; Behan v. Phelps, 27 Misc. 718.

[112] Barrett v. American Telephone & Telegraph Co., 56 Hun, 430.

[113] Later cases have not adopted this rule and it is, in effect, repudiated by Kieley v. Central Complete Combustion Mfg. Co., 147 N. Y. 620.

A general superintendent of the work of operating the lines has been held a managing agent of a telegraph company[114] but otherwise as to a telegraph operator in charge of a local office.[115] A division superintendent of a railroad company is a managing agent[116] but a baggagemaster is not[117] nor is one employed by a steam railroad company to superintend the running of horse cars on an uncompleted portion of its road, he having no control over its affairs, nor knowledge of them, and his employment being only to continue at the pleasure of the president of the company.[118] An agent of an insurance company, authorized to effect insurance, receive premiums, and issue policies, at a place other than that where the principal office of the company is situated, is a managing agent,[119] as is an agent of a life insurance company having charge of its business and sub-agents in a district comprising two cities, with nine assistant superintendents and sixty-two sub-agents.[120] But a superintendent of soliciting agents for a domestic life insurance company having no other authority or power is not a managing agent.[121] Service of summons on the grand-foreman of the Ancient Order of United Workmen is sufficient.[122]

Service on an officer of a corporation, after his resignation or the expiration of his term of office, is insufficient,[123] although the resignation was made for the purpose of preventing service of summons;[124] but the rule is otherwise where the resignation

[114] Barrett v. American Telephone & Telegraph Co., 138 N. Y. 491.

[115] Jepson v. Postal Telegraph Cable Co., 22 Civ. Proc. R. (Browne) 434.

[116] Brayton v. New York, L. E. & W. R. Co., 54 State Rep. 763, 72 Hun, 602, 25 N. Y. Supp. 264.

[117] Flynn v. Hudson River R. Co., 6 How. Pr. 308.

[118] Emerson v. Auburn & O. L. R. Co., 13 Hun, 150.

[119] Bain v. Globe Ins. Co., 9 How. Pr. 448.

[120] Ives v. Metropolitan Life Ins. Co., 78 Hun, 32, 60 State Rep. 495. To same effect Mullins v. Metropolitan Life Ins. Co., 78 Hun, 297, 60 State Rep. 240.

[121] Schryver v. Metropolitan Life Ins. Co., 29 N. Y. Supp. 1092.

[122] Balmford v. Grand Lodge, A. O. U. W., 16 Misc. 4, 73 State Rep. 239, 37 N. Y. Supp. 645.

[123] Buchanan v. Prospect Park Hotel Co., 14 Misc. 435, 70 State Rep. 447, 35 N. Y. Supp. 712.

[124] Ervin v. Oregon Steam Nav. Co., 22 Hun, 598.

is incomplete[125] or where, though the term of office has expired, a successor has not been elected or qualified.[126]

A managing agent does not cease to be such merely because the corporation goes into the hands of a receiver who retains him in office.[127] But if the charter of the corporation has expired, the corporation is dead and the agency is revoked and hence a general manager is no longer a representative.[128]

Service upon an officer of a corporation, whether foreign or domestic, need not be made while such officer is actually engaged in the business of the corporation or acting officially.[129]

§ 723. Foreign corporation.

Personal service of a summons on a defendant which is a foreign corporation must be made by delivering a copy thereof within the state, either (1) to the president, treasurer, secretary, vice-president, assistant treasurer or assistant secretary; or (2) to a person designated for the purpose by a writing under the seal of the corporation, properly signed, accompanied with the written consent of the person designated, and filed in the office of the secretary of state; or (3) by delivering a copy to the cashier, a director or a managing agent within the state, where no person has been designated in writing and the president, treasurer or secretary cannot be found with due diligence, provided the corporation has property within the state or the cause of action arose therein.[130] The purpose of this statute is to prevent a foreign corporation having property within the state from doing business or asserting ownership in this state without making themselves liable to the service of process.

It will be noticed that there are three classes of persons on whom service may be made. The first class includes the president, secretary or treasurer; the second class, a person desig

[125] Wilson v. Brentwood Hotel Co., 16 Misc. 48, 73 State Rep. 274 Carnaghan v. Exporters' & Producers' Oil Co., 32 State Rep. 1117 Timolat v. S. J. Held Co., 17 Misc. 556, 75 State Rep. 97; Sturges v Crescent Jute Mfg. Co., 32 State Rep. 848, 10 N. Y. Supp. 470.

[126] Fridenberg v. Lee Const. Co., 27 Misc. 651.

[127] Faltiska v. New York, L. E. & W. R. Co., 12 Misc. 478, 67 State Rep. 381.

[128] Hayden v. Bank of Syracuse, 36 State Rep. 899.

[129] Pope v. Terre Haute Car & Mfg. Co., 87 N. Y. 137.

[130] Code Civ. Proc. § 432.

nated; the third class, the cashier, a director, or a managing agent. Whether service be made on a member of the first class or on the person designated which constitutes the second class, is a matter of choice. But service on one belonging to the third class cannot be made unless (a) service cannot be made on a person belonging to the first two classes and (b) the corporation has property within the state or the cause of action arose here.

As to the first class there is no difficulty in ascertaining who is the president, treasurer or secretary and this class will be dismissed without further consideration except to repeat that service must be made on such an officer, if he can be found within the state by due diligence, unless by choice service is made on a person designated for such purpose; and that it is not necessary that the corporation have any property within the state nor that the cause of action arose here[131] nor that the officer who is served have any business or place of business within this state in his official capacity, or that the corporation itself have any business here.[132] Summons may be served upon the president, though merely passing through the city not on the business of the corporation.[133]

A consolidation of two foreign corporations does not of itself terminate the term of office of a president of one of the companies in so far as the right of a creditor to thereafter serve process on him is concerned,[134] and where a foreign corporation has been deprived of its rights and franchises by its own government, yet is not absolutely dissolved, jurisdiction over it in the courts of this state may be obtained by service of process on its officers.[135]

——**Person designated by corporation.** The second class requires further consideration. First, the form and contents of the writing constituting the appointment is to be considered and herein the Code is explicit in its directions which are as

[131] Miller v. Jones, 67 Hun, 281, 51 State Rep. 361.

[132] Pope v. Terre Haute Car & Mfg. Co., 87 N. Y. 137.

[133] Pope v. Terre Haute Car & Mfg. Co., 24 Hun, 238, 60 How. Pr. 419. See, also, Hiller v. Burlington & M. R. R. Co., 70 N. Y. 223.

[134] Buell v. Baltimore & O. S. W. R. Co., 39 App. Div. 236.

[135] Murray v. Vanderbilt, 39 Barb. 140.

follows: The writing must be "under the seal of the corporation, and the signature of its president, vice-president, or other acting head, accompanied with the written consent of the person designated, and filed in the office of the secretary of state. The designation must specify a place, within the state, as the office or residence of the person designated, and, if it is within a city, the street, and street number, if any, or other suitable designation of the particular locality. It remains in force, until the filing in the same office of a written revocation thereof, or of the consent, executed in like manner, but the person designated may, from time to time, change the place specified as his office or residence, to some other place within the state, by a writing, executed by him, and filed in like manner. The secretary of state may require the execution of (the) instrument * * * to be authenticated as he deems proper, and he may refuse to file it without such an authentication. An exemplified copy of a designation so filed, accompanied with a certificate that it has not been revoked, is presumptive evidence of the execution thereof, and conclusive evidence of the authority of the officer executing it."[136] An attempted designation of a person upon whom service may be made which fails to state the place where service can be made, the consent of the person designated, and is not filed in the office of the secretary of state, is nugatory.[137]

Service of summons on a foreign insurance company may be made on the superintendent of insurance.[138] The insurance law[139] provides that no foreign insurance company shall transact any business of insurance in this state until it has executed and filed in the office of the superintendent of insurance a written appointment of the superintendent to be the attorney for the company on whom service of process may be made. This statute does not, however, exclude any other legal method of

[136] Code Civ. Proc. § 432, subd. 2.

[137] McClure v. Supreme Lodge, K. of H., 41 App. Div. 131.

[138] People ex rel. Firemen's Ins. Co. v. Justices of City Ct. of New York, 25 Abb. N. C. 403, 19 Civ. Proc. R. (Browne) 418, 33 State Rep. 147.

[139] L. 1892, c. 690, § 30, which is substantially the same as L. 1884, c. 346

service and hence service "may" be made on a foreign insurance company in the same manner as on other foreign corporations.[140] The appointment of the superintendent as agent is sufficient where it describes that officer by his title and not his individual name, and appoints him or his successors in office; and it is sufficient that it was certified and authenticated so as to satisfy the superintendent that it had been made. It is not necessary that it should be so certified as to entitle it to be read in evidence.[141] On refusal of permission to do business, the designation becomes inoperative.[142] The authority continues until revocation.[143] The designation is official in its character, and not personal, and the superintendent may in turn designate a clerk to act for him, so that service upon the clerk, authenticated by written admission of the superintendent, is good service.[144] So service on the deputy superintendent of insurance, where the superintendent is out of town, is sufficient.[145]

—— **Cashier, director or managing agent.** If service can not be obtained on one of the persons already mentioned, service may be made on the cashier, a director or a managing agent, provided the corporation has property in the state or the cause of action arose here. There are two conditions precedent: (a) inability to serve president, secretary, treasurer, or person designated by corporation[146] and (b) the presence of property of the corporation in this state or a cause of action which arose here. The property within the state must be something from which the creditor may have some chance of benefit[147] i. e., such property as may be taken under a writ of attachment.[148]

[140] Howard v. Prudential Ins. Co., 1 App. Div. 135, 73 State Rep. 447; Silver v. Western Assur. Co., 3 App. Div. 572, 73 State Rep. 796.

[141] Lafflin v. Travelers' Ins. Co., 121 N. Y. 713.

[142] Richardson v. Western Home Ins. Co., 29 State Rep. 820.

[143] Turner v. Fire Ins. Co. of Philadelphia County, 17 Wkly. Dig. 212

[144] South Pub. Co. v. Fire Ass'n of Philadelphia, 67 Hun, 41, 51 State Rep. 29.

[145] Quinn v. Royal Ins. Co., 81 Hun, 207, 62 State Rep. 738.

[146] Vitolo v. Bee Pub. Co., 66 App. Div. 582; Travis v. Railway Educational Ass'n, 33 Misc. 577.

[147] Barnes v. Mobile & N. W. R. Co., 12 Hun, 126.

[148] Bates v. New Orleans, J. & G. N. R. Co., 4 Abb. Pr. 72.

Little difficulty is experienced in determining who is a director or the cashier[149] but the shot gun phrase "managing agent" has been the source of many adjudications. Owing to the infinite variety of business carried on in this state by foreign corporations, no inflexible rule can be laid down to fix the true division line between managing and other agents.[150] It has been said that a managing agent is a person invested with general power involving the exercise of judgment and discretion, as distinguished from an ordinary agent or employee who acts in an inferior capacity and under the direction and control of superior authority both in regard to the extent of the work and the manner of executing it.[151] It should be noticed that the statute reads "a" managing agent and not "the" managing agent[152] and hence a person designated by the corporation as a general agent, though followed by words indicating some one department, where he is in charge of the office of the corporation in this state, where a substantial portion of the business of the company is transacted by him, is a managing agent.[153] A "managing agent" of a foreign railway corporation need not be one who controls "the general and practical operations and business of running its road."[154] Whether the agent is paid by a salary or by commissions is of little importance.[155] The fact that one's name appears in a city directory as "manager" or that he states that he is the representative of the company, is not sufficient evidence that he is a managing agent.[156]

[149] A person who receives whatever cash a foreign corporation receives in this state on sales made here is its cashier. McCulloh v. Paillard Non-Magnetic Watch Co., 38 State Rep. 406.

[150] Palmer v. Chicago Evening Post Co., 85 Hun, 403.

[151] Reddington v. Mariposa Land & Min. Co., 19 Hun, 405, which held that an officer employed to transfer stock of the corporation and receive and transmit assessments was not a managing officer. Taylor v. Granite State Provident Ass'n, 136 N. Y. 343.

[152] Brayton v. New York, L. E. & W. R. Co., 72 Hun, 602, which held a division superintendent "a" managing agent.

[153] Tuchband v. Chicago & A. R. Co., 115 N. Y. 437.

[154] Tuchband v. Chicago & A. R. Co., 115 N. Y. 437.

[155] Brewer v. Knapp, 27 Civ. Proc. R. (Kerr) 41.

[156] Coler v. Pittsburgh Bridge Co., 146 N. Y. 281; Vitolo v. Bee Pub. Co., 66 App. Div. 582.

An attorney for a foreign corporation is not a managing agent[157] nor is the resident agent of a foreign railroad corporation who sells tickets[158] nor is an assistant secretary of a foreign railroad company, whose principal duty is making out stock certificates, and who only acts under express direction.[159] Whether a resident advertising agent of a foreign corporation is a managing agent has been the subject of conflicting decisions[160] but the better reasoning seems to be that where he acts on a prescribed schedule of rates with no other instructions than he receives from the main office of the company, he is a managing agent.[161] An agent having full power to arrange for sales of patent rights, is, it seems, a managing agent.[162]

Where the person designated by a foreign corporation to receive service could not be found within the state and the summons and complaint were delivered to the custodian of property attached by plaintiff, and by the custodian turned over to the general managing agent of the corporation who returned them to him, the delivery of the papers to the custodian with the knowledge of the facts communicated by the agent to the corporation does not constitute a good service on a managing agent.[163]

At the time of service, the officer or agent need not be performing the functions of his office within this state. It is sufficient if he is temporarily in this state in pursuit of his private business.[164]

[157] Taylor v. Granite State Provident Ass'n, 136 N. Y. 343.

[158] Doty v. Michigan Cent. R. Co., 8 Abb. Pr. 427.

[159] Sterett v. Denver & R. G. Ry. Co., 17 Hun, 316.

[160] That he is, see Brewer v. Knapp, 27 Civ. Proc. R. (Kerr) 41; Palmer v. Chicago Evening Post Co., 85 Hun, 403.

That he is not, see Vitolo v. Bee Pub. Co., 66 App. Div. 582, 10 Ann. Cas. 337, and Fontaine v. Post Printing and Publishing Co., 84 N. Y. Supp. 308.

[161] Palmer v. Chicago Evening Post Co., 85 Hun, 403, 66 State Rep. 476, 2 Ann. Cas. 69.

[162] Perrine v. Ransom Gas Mach. Co., 60 App. Div. 32.

[163] Kieley v. Central Complete Combustion Mfg. Co., 147 N. Y. 620.

[164] Porter v. Sewall Safety Car Heating Co., 23 Abb. N. C. 233, 17 Civ. Proc. R. (Browne) 386; Hiller v. Burlington & M. R. R. Co., 70 N. Y. 223.

§ 724. New York city.

Personal service of the summons if the action is against the mayor, aldermen, or commonalty of the city of New York must be made by delivering a copy to the mayor, comptroller or counsel to the corporation.[165] The Greater New York charter provides that all process and papers for the commencement of actions and legal proceedings against the city of New York shall be served either upon the mayor, comptroller or the corporation counsel.[166]

§ 725. City other than New York city.

Personal service of summons in an action against a city other than New York city must be made by delivering a copy to the mayor, treasurer, council, attorney or clerk or, if the city lacks either of those officers, to the officer performing corresponding functions under another name.[167]

§ 726. Unincorporated association.

It would seem that service on an unincorporated association of seven or more members, should be made on the president or treasurer though service may be made on the chairman where he is really the president thereof.[168]

[165] Code Civ. Proc. § 431, subd. 1.
[166] Section 263 of the Greater New York Charter.
[167] Code Civ. Proc. § 431, subd. 2.
[168] Hatheway v. American Min. Stock Exch., 31 Hun, 575.

CHAPTER III.

SUBSTITUTED SERVICE OF SUMMONS.

§ 727. The statutes.

Prior to 1853, there was no such thing as substituted service as it is now known. In 1853, an act was passed "to facilitate the service of process in certain cases."[1] The purpose was to provide a mode of service where service by publication could not be obtained. This statute was amended in 1863 and finally embodied in the present Code in nearly the same form as when originally enacted.[2]

The statute is constitutional. It does not deprive a person of property without due process of law.[3]

§ 728. When allowable.

Where a summons is issued in any court of record,[4] against a resident of the state, the Code authorizes a so-called substi-

[1] Sess. L. 1853, p. 974.

[2] Code Civ. Proc. §§ 435-437.

[3] Continental Nat. Bank v. United States Book Co., 143 N. Y. 648.

[4] Prior to 1880 (L. 1880, c. 535) this rule was confined to the supreme court. It now applies to the New York city court. Molloy v. Lennon, 22 Misc. 542.

tuted service in two instances: (a) where defendant cannot be found after proper and diligent effort to effect service upon him and the place of his sojourn cannot be ascertained; (b) where defendant is within the state but avoids or evades such service. The two grounds for substituted service, it will be noticed, are in the alternative.[5]

The statute, in permitting this kind of service, intended it only as a means of reaching runaway debtors whose place of sojourn cannot be located, and those who remain at home but avoid service of process. It was not intended to reach debtors temporarily absent on business at a known place whose place of "sojourn" can be ascertained.[6] Hence an order for substituted service is improper where plaintiffs know, at the time it is granted, the precise whereabouts of the defendant without the state.[7] It is not necessary, however, that defendant was endeavoring to conceal the place of his sojourn, but it is enough that he left the state and remained away for several months without leaving any one to represent him or give information of his whereabouts.[8]

The word "found," as used in the statute, has been considered the equivalent of "reach."[9] So if defendant is sick and his wife refuses to allow the officer to see him or to serve him, it would seem that he could not be "found,"[10] and likewise where the parents of the defendant repeatedly refuse to allow the summons server to see defendant.[11]

A corporation is incapable of concealing itself to avoid service of process so as to authorize an order for substituted serv-

[5] Hence, an order was authorized when the defendant could not be reached by reason of his illness, although he was not evading service. Carter v. Youngs, 42 Super. Ct. (10 J. & S.) 169.

[6] Ottman v. Daly, 17 Civ. Proc. R. (Browne) 62.

[7] Smith v. Fogarty, 6 Civ. Proc. R. (Browne) 366; Foot v. Harris, 2 Abb. Pr. 454; Collins v. Campfield, 9 How. Pr. 519; Jones v. Derby, 1 Abb. Pr. 458.

[8] Continental Nat. Bank v. Thurber, 74 Hun, 632, 57 State Rep. 226.

[9] Opinion of Sanford, J., in Carter v. Youngs, 42 Super. Ct. (10 J. & S.) 169.

[10] Carter v. Youngs, 42 Super. Ct. (10 J. & S.) 169.

[11] McCarthy v. McCarthy, 16 Hun, 546.

ice upon that ground,[12] but substituted service may be made on infants whose parents keep them from the presence of the officer as such acts amount to an avoidance or evasion of service and the acts of the parent are imputable to the child.[13]

§ 729. Proof to obtain order.

The proof to warrant the order is required to be "satisfactory" proof that proper and diligent effort has been made to serve the summons upon the defendant, and that the place of his sojourn cannot be ascertained, or, if he is within the state, that he avoids service so that personal service cannot be made.[14] It will be observed that the quantum of proof is left to the court or judge and that the affidavit, or certificate, should state facts from which the court or judge may draw the conclusions specified in the Code. It need only be "satisfactory" proof tending to prove the necessary facts.[15] An affidavit that defendant cannot be found in "this" state may be sufficient.[16] But the fact that the place where defendant sojourns cannot be ascertained, must be shown.[17] The application should be made promptly. The proof may be by (a) affidavit of a person not a party to the action or by (b) the return of the sheriff of the county where defendant resides.[18]

—— Form of affidavit.

——— being duly sworn, says:

I. That he is [state who deponent is].

II. That defendant, ———, is a resident of the state of New York and his place of residence is in ——— city, ——— street.

[12] Hahn v. Anchor Steamship Co., 2 City Ct. R. 25.

[13] Steinhardt v. Baker, 163 N. Y. 410.

[14] Code Civ. Proc. § 435.

[15] McCarthy v. McCarthy, 16 Hun, 546; Baker v. Stephens, 10 Abb. Pr., N. S., 1. Proof that the sheriff had repeatedly made attempts to serve defendant personally, but had been unable to find her, that plaintiff's attorney was informed on inquiry at her residence that she had gone away to be absent for some time, and was refused information as to where she had gone, or when she would return, is sufficient. Phillips v. Winne, 47 State Rep. 412, 20 N. Y. Supp. 49.

[16] Simpson v. Burch, 4 Hun, 315.

[17] Ottman v. Daly, 17 Civ. Proc. R. (Browne) 62.

[18] Code Civ. Proc. § 435.

Order.

III. That a summons in this action was placed in the hands of deponent on ——— day of ———, 19—, to serve upon defendant.

IV. That deponent attempted to serve the said papers, by going to defendant's office, located at ———, on the ——— days of ———, and by calling at the said defendant's residence on ——— street in the city of ——— on the ——— days of ——— and by visiting the ——— club, which defendant was accustomed to frequent, on the ——— days of ———, but that defendant could not be found.

V. [If defendant is without the state] That defendant's place of sojourn outside the state cannot be ascertained though diligent inquiry has been made by [state what steps have been taken to find place of sojourn].

VI. [If defendant conceals himself, facts may he stated as in forms of affidavits set forth in Baker v. Stephens, 10 Abb. Pr., N. S., 1, 8, 9.]

VII. That no previous application for an order for substituted service has been made herein except ———.[19]

§ 730. Order.

The order must direct that the service of the summons be made by leaving a copy thereof and of the order at the residence of the defendant, with a person of proper age, if, upon reasonable application, admittance can be obtained and such person found who will receive it; or, if admittance cannot be so obtained nor such a person found, by affixing the same to the outer or other door of the defendant's residence and by depositing another copy thereof, properly inclosed in a post-paid wrapper, addressed to him at his place of residence, in the post office at the place where he resides.[20] A direction in an order for substituted service that it be made on defendant at a place other than his residence, was held a fatal error prior to the amendment of 1896[21] but now, on proof being made by affidavit that defendant's residence can not be found, "service of the summons may be made in such manner as the court may direct."[22]

—— **Who may make.** The order may be made by the court,

[19] This form is largely based on Nagle v. Taggart, 4 Abb. N. C. 144.

[20] Code Civ. Proc. § 436.

[21] Fisk v. Bennett, 69 Hun, 272, 53 State Rep. 309.

[22] Code Civ. Proc. § 436, last clause.

or a judge thereof, or the county judge of the county where the action is triable.[23]

—— Form of order.

[Title of the court and cause.]

It appearing to my satisfaction [or to the court if a court order], by the affidavits of ———. that the summons, a copy of which is hereto annexed, has been delivered to said ———. to be served, and that defendant ——— has a place of business in said city; that said ——— have made proper and diligent efforts to serve the same personally upon him, and that said defendant evades such service, so that the same cannot be personally served:

Now, on motion of ———, attorney for plaintiff, it is ordered:

That the service of the said summons be made by leaving a copy thereof at ———, the only known place where said ——— can be communicated with, with some person of proper age, if admittance can be obtained and such proper person found who will receive the same, and, if admittance cannot be obtained, or any such proper person found who will receive the same, then that the said service be made by affixing the same to the outer or other door of said place of business, and by putting another copy thereof, properly folded and enveloped, and directed to the person to be served, at ———, into the postoffice of said city, and paying the postage thereon.[24]

—— **Vacating or setting aside.** As an order for substituted service is not a provisional remedy, a motion to vacate it may be made before the judge who granted it and need not be made within the judicial district in which the action is triable or in an adjoining county, as in case of motions to vacate orders granting provisional remedies.[25] The order should not be set aside together with the summons and the service thereof, merely because plaintiff's Christian name was erroneously given in the copy of the summons annexed to the order.[26] It is no objection to vacating an order for substituted service that the statute of limitations may run if the service is set aside.[27]

—— **Collateral attack.** The decision of the court or judge that the facts warrant the issuance of the order for substituted service, followed by an order therefor, is res judicata

[23] Code Civ. Proc. § 435.

[24] This form was used in Baker v. Stephens, 10 Abb. Pr., N. S., 1.

[25] McCarthy v. McCarthy, 13 Hun, 579.

[26] Farrington v. Muchmore, 52 App. Div. 247.

[27] Ottman v. Daly, 17 Civ. Proc. R. (Browne) 62.

and while the order may be voidable so as to be subject to be set aside on direct motion, it can not be collaterally attacked on motion to vacate the judgment[28] or on a motion to vacate an attachment issued thereon, where it recites all the necessary jurisdictional facts.[29] For instance, residence of defendant within the state is a "jurisdictional" fact but the other facts, as before stated, are merely to be proved to the "satisfaction" of the court or judge.[30]

§ 731. Filing order and papers.

The order and the papers on which granted, must be filed within ten days after the order is granted or the order will become inoperative.[31]

§ 732. Service.

Service must be made within ten days after the order is granted or else the order will become inoperative.[32] Both service on a person at defendant's residence and the affixing a copy and mailing, are not required,[33] nor need the parent, guardian, or other person with whom the infant resides, be served.[34]

§ 733. Effect.

On filing an affidavit and showing service according to the order, the summons is deemed served and the same proceedings may be had thereupon as if it had been served by publication pursuant to an order for that purpose.[35]

[28] Collins v. Ryan, 32 Barb. 647.
[29] Baker v. Stephens, 10 Abb. Pr., N. S., 1.
[30] Haswell v. Lincks, 87 N. Y. 637.
[31] Code Civ. Proc. § 437.
[32] Code Civ. Proc. § 437.
[33] Overton v. Barclay, 69 State Rep. 716, 35 N. Y. Supp. 326.
[34] Steinhardt v. Baker, 20 Misc. 470.
[35] Code Civ. Proc. § 437; Orr v. McEwen, 16 Hun, 625; Smith v. Fogarty, 6 Civ. Proc. R. (Browne) 366; Clark v. Lockard, 13 Civ. Proc. R. (Browne) 278, 16 State Rep. 739; Ferris v. Plummer, 46 Hun, 515.

CHAPTER IV.

SERVICE BY PUBLICATION.

ART. I. NATURE OF CONSTRUCTIVE SERVICE AND GROUNDS THEREFOR.

§ 734. Preliminary considerations.

For cases where service cannot be had, either by actual service upon the defendant, or by the substituted method of serving at his usual place of abode, a purely statutory method has been adopted, by means of which nonresident persons and corporations may be constructively notified of the commencement of legal proceedings by the publication of the summons in a newspaper, in accordance with prescribed formalities, for a certain length of time. This method is a complete departure from the common law which recognized no method of acquiring jurisdiction unless personal service could be made upon the defendant, or property belonging to him and within the jurisdiction of the court subjected to its authority. As a purely statutory method, extending, in effect, the jurisdiction of the court beyond its proper limits, it is to be strictly construed

and applied;[1] and it is now well settled that under the fourteenth amendment to the constitution of the United States, it is never available for the purpose of obtaining a personal judgment against one who has not been personally served with the summons, or has not appeared in the action, and is confined to proceedings in rem or quasi in rem. In such cases it is equally clear, upon the principles applied, that its effect cannot extend beyond a disposition of the property under the control of the court.

An apparent exception to the rule exists when statutes authorize a judgment for divorce, where one party is a nonresident, without personal service of the summons; but the remedy in such cases is one within the inherent power of the state legislature to determine the "status" of a citizen towards a nonresident, and therefore not really an exception.[2]

The rule that a personal judgment can not be entered against a nonresident defendant unless he appears in the action, is embodied in the Code provision that a judgment by default, on service by publication, can not be rendered for a sum of money only, except in an action wherein an attachment has been granted.[3] But this statutory rule does not preclude the granting of an order for publication although the action is one in which judgment could not be entered by default under the statute. Such order is neither irregular nor invalid.[4]

§ 735. When allowable.

The Code enumerates seven cases in which an order may be made directing the service of a summons on a defendant without the state or by publication.[5] These cases will now be considered in the order enumerated in the Code section.

—— **(1) Non-residence.** The first case enumerated is where

[1] Kendall v. Washburn, 14 How. Pr. 380; Haight v. Husted, 4 Abb. Pr. 348.

[2] Pennoyer v. Neff, 95 U. S. 714; McKinney v. Collins, 88 N. Y. 216.

[3] Code Civ. Proc. § 1217.

[4] Clarke v. Boreel, 21 Hun, 594; Parke v. Gay, 28 Misc. 329.

[5] Code Civ. Proc. § 438.

These provisions do not apply to the New York city court. Code Civ. Proc. § 3160.

defendant is a natural person and not a resident of the state or is a foreign corporation, or where, after diligent inquiry, the defendant remains unknown to the plaintiff or the plaintiff is unable to ascertain whether or not the defendant is a resident of the state.[6] There need be no attachment of property under this subdivision unless a judgment is sought for money only.[7]

—— **(2) Departure from state, or concealment within, with intent to defraud creditors.** The second group of cases in which the order may be made is where a resident defendant has departed from the state with intent to defraud his creditors or to avoid the service of a summons, or where he keeps himself concealed within the state with like intent.[8] To establish intent to defraud creditors it must appear that the absconding debtor had some property.[9] To establish intent to avoid service, it must appear that a summons was, or that the debtor believed it was, about to be issued.[10] Mere inability to obtain service at a special time is not sufficient evidence of intent on the part of defendant to avoid service of process.[11] Openly avoiding service, by eluding the officer, is not keeping concealed.[12]

—— **(3) Absence from state for more than six months.** The third group of cases in which the order is warranted, is where an adult defendant who is a resident of the state has been continuously without the state for more than six months next before the granting of the order and has not designated a person on whom to serve a summons in his behalf, or such designation no longer remains in force, or service upon the person so designated cannot be made within the state after diligent effort.[13]

[6] Code Civ. Proc. § 438, subd. 1.
[7] Code Civ. Proc. § 1217; Miller v. Jones, 67 Hun, 281, 287.
[8] Code Civ. Proc. § 438, subd. 2.
[9] Towsley v. McDonald, 32 Barb. 604.
[10] Towsley v. McDonald, 32 Barb. 604.
[11] Foster v. Moore, 68 Hun, 526, 52 State Rep. 662.
[12] Van Rensselaer v. Dunbar, 4 How. Pr. 151.
[13] Code Civ. Proc. § 438, subd. 3.
Prior to 1899 absence from the United States and not from the state was the ground. See L. 1899, c. 301.

—— **(4) Matrimonial actions.** The fourth group of cases in which the order may be granted, comprises actions where the complaint demands judgment annulling a marriage, or for a divorce, or for a separation.[14]

—— **(5) Actions affecting title to property.** The fifth class of cases in which the order may be granted, comprises actions where the complaint demands judgment that the defendant be excluded from a vested or contingent interest in, or lien upon, specific real or personal property within the state, or that such an interest or lien in favor of either party be enforced, regulated, defined or limited, or otherwise affecting the title to such property.[15] This subdivision applies to equitable actions wherein the object is to give some specific relief other than a simple money judgment, such as an action to cancel a mortgage on the ground of usury or to enforce specific performance, or to attain such relief as by the rules of the common law was denied to the suitor in its forum. The words "subject of the action," as used herein, seem to mean the property or thing concerning which the proceeding is instituted and carried on, and the changes to be effected by it. And it seems that jurisdiction over the "subject of the action" is not obtained until the property or thing to be affected by the action is seized or taken by legal process.[16]

—— **(6) Where statute of limitations interferes.** The sixth group of cases where the order is granted comprises actions where defendant is a resident of the state or a domestic corporation, and an attempt has been made to commence the action against the defendant before the expiration of the limitation applicable thereto, and the limitation would have expired

[14] Code Civ. Proc. § 438, subd. 4.

[15] Code Civ. Proc. § 438, subd. 5; Chesley v. Morton, 9 App. Div. 461, 75 State Rep. 860.

This Code subdivision is not limited to chattels but the more extensive term, "personal property," is used. Miller v. Jones, 67 Hun, 281, 51 State Rep. 361.

The property must be within the state. Von Hesse v. Mackaye, 55 Hun, 365.

[16] McKinney v. Collins, 88 N. Y. 216, 221.

within sixty days next preceding the application, if time had not been extended by the attempt to commence the action.[17]

—— **(7) Actions against stockholders.** The seventh group of cases in which the order is warranted, includes actions authorized by the laws of this state against the stockholders of a corporation or joint stock company, where defendant is a stockholder thereof.[18]

§ 736. Persons who may be served by publication.

As will be observed by reading the Code grounds for service by publication, such service is allowable, in some instances, though the defendant is a resident, as where plaintiff can not ascertain his residence; or where he has departed from the state, or concealed himself within it, with intent to defraud creditors. So service by publication may be made on unknown persons joined as parties. But, in the great majority of cases of publication, the defendant is a nonresident or a foreign corporation. The nonresident may be an infant[19] and the Code expressly provides as to the mode of service by publication where defendant is an infant under fourteen.[20] A person is none the less a non-resident because he is temporarily within the state at the time of service by publication.[21]

§ 737. Procedure where copy of summons is required to be delivered to a person other than defendant.

Service of summons without the state or by publication, where the defendant is an infant under fourteen or a person judicially declared incompetent to manage his affairs, may be made pursuant to an order as if the person on whom personal service would have to be made was the defendant in the action.

[17] Code Civ. Proc. § 438, subd. 6. See, also, Code Civ. Proc. § 399. Publication was ordered on this ground in Whiton v. Morning Journal Ass'n, 23 Misc. 299.

[18] Code Civ. Proc. § 438, subd. 7.

[19] Wheeler v. Scully, 50 N. Y. 667; Syracuse Sav. Bank v. Burton, 6 Civ. Proc. R. (Browne) 216.

[20] See post, § 737.

[21] Syracuse Sav. Bank v. Burton, 6 Civ. Proc. R. (Browne) 216; Duche v. Voisin, 18 Abb. N. C. 358.

and upon a verified complaint and the same proof with respect to such person as is required with respect to a defendant, and the Code sections relating to order, publication, service without the state, etc., apply to the proceedings in like manner as if such person was the defendant.[22]

ART. II. PROOF TO OBTAIN ORDER.

§ 738. The Code provision.

The proof to be furnished to obtain the order must be as follows:

1. A verified complaint showing a cause of action against the defendant to be served.

2. Proof by affidavit of the facts required by section 439 of the Code, according to the ground on which the order is sought.

3. Proof that plaintiff has been or will be unable, with due diligence, to make personal service of the summons. [But this proof is not required where the application is made on the second, third or sixth ground for the order as already enumerated].[23]

§ 739. Verified complaint.

The Code requires that an order for service by publication must be founded upon a verified complaint showing a sufficient cause of action. This means not simply a complaint that would withstand a demurrer on that ground, but one which states a cause of action against the defendant of which the court can take cognizance, and of which it has jurisdiction as to him.[24] The court may lack jurisdiction either through statutory limitations placed on its power or by reason of the absence from this state of the person sued or the subject matter of the action.[25] For instance, an order for publication of the summons

[22] Code Civ. Proc. § 438, subd. 7.

[23] Code Civ. Proc. § 439.

[24] Paget v. Stevens, 143 N. Y. 172; Montgomery v. Boyd, 60 App. Div. 133.

[25] Von Hesse v. Mackaye, 55 Hun, 365; Von Hess v. Morton, 16 Civ. Proc. R. (Browne) 333; Devlin v. Roussel, 36 App. Div. 87.

against a nonresident defendant cannot be sustained in a creditor's suit to avoid an alleged fraudulent transfer of copyrights by the debtor to such defendant without the state.[26] On the other hand, an action to vacate a judgment annulling a marriage, because obtained by fraud, is in the nature of an action in rem so that service by publication may be made on the nonresident husband, since the judgment is a res remaining within the jurisdiction.[27] The action need not, however, be one which, in all its aspects, may be maintained here as where a greater measure of relief is asked for than can be given in this jurisdiction.[28] If the action is against a foreign corporation, all the facts required by the statute as necessary to an action in this state,[29] must be set forth in the complaint.[30] The complaint must determine whether a sufficient cause of action exists, and the court will not upon the motion for the order for publication, try the issue whether there are assets within the jurisdiction.[31] If the complaint is insufficient, because not stating a cause of action cognizable by our courts, it cannot be amended on motion to vacate an order for service by publication.[32]

The verification must be in the form prescribed by statute and if sworn to without the state the authority of the officer taking the affidavit must be duly certified or else the order for publication can not be granted or, if granted, is void.[33]

The original verified complaint need not be "presented" as it is sufficient that such a complaint is on file. The actual pres-

[26] Bryan v. University Pub. Co., 112 N. Y. 382.

[27] Everett v. Everett, 22 App. Div. 473.

[28] Chesley v. Morton, 9 App. Div. 461.

[29] See Code Civ. Proc. § 1780.

[30] Foster v. Electric Heat Regulator Co., 16 Misc. 147, 74 State Rep. 362, 25 Civ. Proc. R. (Scott) 223.

[31] Chesley v. Morton, 9 App. Div. 461, 75 State Rep. 860.

[32] Foster v. Electric Heat Regulator Co., 16 Misc. 147, 74 State Rep. 362, 25 Civ. Proc. R. (Scott) 223; Ladenburg v. Commercial Bank, 87 Hun, 274.

[33] Phelps v. Phelps, 6 Civ. Proc. R. (Browne) 117; Williamson v. Williamson, 3 Civ. Proc. R. (Browne) 69, 2 Civ. Proc. R. (McCarty) 428, 64 How. Pr. 450.

entation of the particular verified complaint to the judge on obtaining such order is unnecessary.[34]

§ 740. Affidavits.

The proof of the jurisdictional facts must be made by affidavit. The return of a sheriff is not sufficient.[35] But an affidavit used in a different suit may be read.[36]

The affidavits need not furnish conclusive evidence of the facts relied on, but it is sufficient if the proof has a legal tendency to make out, in all its parts, a case for the action of the judge.[37]

It is important to bear in mind the difference between affidavits which state all the essential facts but state them insufficiently and affidavits which fail to state one or more essential facts, in so far as the question of jurisdiction of the person is concerned. In the one case, the court obtains jurisdiction and the order for publication is voidable only on a direct motion to set it aside.[38] In the other case, the court obtains no jurisdiction and the judgment is subject to collateral attack at any time.[39] A stricter rule will be applied where the affidavit is directly attacked by the defendant himself than when it is collaterally attacked by third persons[40] and a very strong

[34] This rule is supported by McCully v. Heller, 66 How. Pr. 468 and Stow v. Stacy, 14 Civ. Proc. R. (Browne) 45. To the contrary is Ladd v. Terre Haute C. & M. Co., 13 Wkly. Dig. 209, and though the decision is a general term decision and the other decisions are special term decisions, yet the rule as stated is deemed the better rule.

[35] Doheny v. Worden, 75 App. Div. 47; Waffle v. Goble, 53 Barb. 517, 35 How. Pr. 356; Easterbrook v. Easterbrook, 64 Barb. 421.

[36] Barnard v. Heydrick, 49 Barb. 62, 2 Abb. Pr., N. S., 47; Brainerd v. Heydrick, 32 How. Pr. 97.

[37] Schroeder v. Lear, 17 Wkly. Dig. 574; Van Wyck v. Hardy, 4 Abb. App. Dec. 496, 39 How. Pr. 392; Belmont v. Cornen, 82 N. Y. 256; Peck v. Cook, 41 Barb. 549.

[38] Belmont v. Cornen, 82 N. Y. 256.

[39] Van Camp v. Searle, 79 Hun, 134, 138; Fischer v. Langbein, 103 N. Y. 84; Towsley v. McDonald, 32 Barb. 604.

[40] Smith v. Mahon, 2 Civ. Proc. R. (Browne) 55 (see concurring opinion of Davis, P. J.).

See, also, post, § 745.

showing will be required where the objection is not raised until several years after judgment.[41]

—— **By whom made.** Affidavits may be made by plaintiff[42] or his attorney[43] or the person who has attempted to serve the summons within the state or by any person acquainted with the facts. But to show due diligence, the person attempting to procure service in this state should himself make an affidavit,[44] and hence proof as to the non-residence of the defendant merely by the plaintiff's affidavit is insufficient.[45]

—— **Averments on information and belief.** In another chapter, the general rules relating to the sufficiency of affidavits based on information and belief, have been considered at length.[46] These rules apply to affidavits to procure an order for publication. The allegations as to non-residence may be based on information and belief provided the source thereof and facts on which it is based, are stated,[47] and the certificate of the sheriff is proper to be considered as a source of information and a basis for such an allegation.[48] The information may be predicated on statements of the mother of defendant[49] or of a friend or relative.[50] If deponent's belief that defendant is in a sister state or foreign country, at the time of making the affidavit, is based on documents such as letters, it is the practice to attach such documents to the affidavits as the contents will not otherwise be considered.[51]

41 Waters v. Waters, 7 Misc. 519, 64 State Rep. 371.

42 Waffle v. Goble, 53 Barb. 517.

43 Salisbury v. Cooper, 33 Misc. 558.

44 Greenbaum v. Dwyer, 4 Civ. Proc. R. (Browne) 276, 66 How. Pr. 266.

45 Hall v. Hall, 23 Abb. N. C. 295.

46 See ante, § 530.

47 Howe Mach. Co. v. Pettibone, 74 N. Y. 68; McKinney v. Collins, 13 Wkly. Dig. 131; Van Wyck v. Hardy, 4 Abb. App. Dec. 496, 39 How. Pr. 392; Steinle v. Bell, 12 Abb. Pr., N. S., 171; Belmont v. Cornen, 82 N. Y. 256; Seiler v. Wilson, 43 Hun, 629.

48 Howe Mach. Co. v. Pettibone, 74 N. Y. 68; McKinney v. Collins, 13 Wkly. Dig. 131; Schroeder v. Lear, 17 Wkly. Dig. 574.

49 Coffin v. Lesster, 36 Hun, 347.

50 Andrews v. Borland, 10 State Rep. 396.

51 Greenbaum v. Dwyer, 4 Civ. Proc. R. (Browne) 276, 66 How. Pr. 266; Barrell v. Todd, 65 App. Div. 22.

—— **Averments as to non-residence.** Where non-residence must be shown, the fact should be expressly stated together with a specific statement where the defendant to be served resides at the time of the making of the affidavit. It is not sufficient to aver non-residence by merely stating that deponent has obtained a writ of attachment on the ground of defendant's nonresidence.[52] The sufficiency of allegations on information and belief has been already considered.[53]

An affidavit is insufficient to sustain an order which directs publication merely, without directing service by mail also, unless it shows plaintiff's inability to discover defendant's residence.[54]

—— **Averments as to diligence in attempting to make personal service.** Where the application is made on the ground that the defendant is a non-resident or a foreign corporation or that the action is a matrimonial action, or that the complaint demands a judgment affecting the title to property, or that the action is against the stockholders of a corporation or a joint stock company, the affidavit must, inter alia, show that plaintiff has been, or will be, unable, with due diligence, to make personal service of the summons.[55] A mere naked assertion of nonresidence in the affidavit, without any allegation that the defendants could not, after due diligence, be found within the state, or any statement showing that an effort has been made to find them, is not enough to justify an order of publication,[56] as the party might be temporarily within the state to plaintiff's knowledge.[57] Furthermore, it is ordinarily not sufficient to merely state that defendant could not be found within the state though due search was made for him, but it is neces-

[52] Young v. Fowler, 73 Hun, 179.

[53] See ante, § 530.

[54] Hyatt v. Wagenright, 18 How. Pr. 248; Cook v. Farren, 34 Barb 95; Cook v. Farmer, 12 Abb. Pr. 359; Cook v. Farnam, 21 How. Pr. 286.

[55] Code Civ. Proc. § 439.

[56] Carleton v. Carleton, 85 N. Y. 313; Bixby v. Smith, 3 Hun, 60, 5 Thomp. & C. 279; Argall v. Bachrach, 18 Wkly. Dig. 267; Hyatt v. Swivel, 52 Super. Ct. (20 J. & S.) 1; Peck v. Cook, 41 Barb. 549; McLeod v. Moore, 15 Civ. Proc. R. (Browne) 77.

[57] Fetes v. Volmer, 28 State Rep. 317, 8 N. Y. Supp. 294.

sary to state the facts themselves.[58] But if the proof of nonresidence and that defendant is living out of the state and in a "distant" state, is clear and conclusive, proof of due diligence, beyond a mere statement that defendant cannot, after due diligence, be found within the state, is not required.[59] That defendant is living in an adjoining or nearby state, does not, however, dispense with specific proof of due diligence.[60]

"Due diligence" means not extraordinary but only proper and suitable diligence. Proof that no diligence would result in such service, because the nonresident defendants are actually located and living without the state, although alleged on information and belief, if coupled with evidence of due efforts to procure correct information and a statement of the source, is sufficient without an express allegation in the language of the statute of the resulting conclusion of inability to make personal service within the state.[61] So the statement in an affidavit "that said defendant cannot with due diligence be served personally within the state," must be regarded not solely as a conclusion of law, but as a statement of fact tending to show that due diligence had been used.[62] It is not necessary for plaintiff's attorney to issue a summons to every county within the state.[63]

If defendant's whereabouts are unknown, an affidavit that defendant "cannot, after due diligence, be found within this state and that his residence is unknown to this deponent, nor can the same after reasonable diligence be ascertained by him, this deponent," is a sufficient statement to confer jurisdiction to make the order.[64]

[58] Von Rhade v. Von Rhade, 2 Thomp. & C. 491; McCracken v. Flanagan, 127 N. Y. 493.

[59] Kennedy v. New York Life Insurance & Trust Co., 101 N. Y. 487; Lockwood v. Brantly, 31 Hun, 155.

[60] Orr v. Currie, 14 Misc. 74, 69 State Rep. 553, 2 Ann. Cas. 94.

[61] Chase v. Lawson, 36 Hun, 221; Hudson v. Kowing, 4 State Rep. 866.

[62] Jerome v. Flagg, 48 Hun, 351, 15 State Rep. 827, 15 Civ. Proc. R. (Browne) 79.

[63] Belmont v. Cornen, 82 N. Y. 256.

[64] Salisbury v. McGibbon, 58 App. Div. 524.

So an affidavit by plaintiff's attorney that the defendant could not

—— Forms of affidavits.

X., being duly sworn, says:

I. That he is [state deponent's connection with the case] in the above entitled action.

II. That said action is commenced to [briefly state nature of action] as set forth in the verified complaint herein which was filed in the office of the clerk of the county of ——— on the ——— day of ———, 19—.

III. That the above named defendant [state residence as a matter of fact, if possible; if not, on information and belief, giving the sources of the information and the facts on which belief is based. If defendant is an infant under fourteen or an adjudged lunatic and the guardian or committee is without the state, allege the same facts with respect to such guardian or committee as if they were the only defendants to be served by publication.]

IV. That deponent has made diligent efforts to find the said defendant within this State with the intent and for the purpose of serving ——— personally with the summons in this action, in the following ways, namely, by * * * but that all of deponent's said efforts to find said defendant have proved fruitless and unavailing, and he has been unable to find the said defendant ——— within this State.

[If defendant is a foreign corporation, state what efforts have been made to find officers or agents on whom to personally serve process and also negative appointment of person in this state to receive service of process.]

V. That no previous application, etc.

Another form which has been sustained was as follows:

X, being duly sworn, doth depose and say, that he is the attorney for the plaintiff in the above entitled action; that this action is brought to foreclose a mortgage made and executed by the said defendants ——— to the said plaintiff, to secure the sum of ———, with interest, on real property in the county of ——— in this state.

That a cause of action exists in favor of the said plaintiff against the said defendants, by reason of the non-payment of the bond for

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be found within the state after due diligence; that he had been informed by persons who knew defendant that he had departed from the state several years before and had never returned, together with an affidavit by defendant's sister that he had left New York seven years previously; that she had never since heard from him, and though she had made diligent inquiry she was unable to get any information concerning him, but believed he was not a resident of the state, has been held sufficient. Brenen v. North, 7 App. Div. 79, 25 Civ. Proc. R. (Scott) 398.

which the said mortgage was given as security, as set forth in the complaint filed in this action, and that said defendants are proper parties to said action as owners of the equity of redemption in said premises.

That the said defendants ——— are not residents of this state but reside in the town of ——— in the state of ———, as deponent is informed by ——— of this city, counsellor at law, who has had professional dealings with said defendants, which information deponent believes to be true.

That a summons has been issued in this action directed to the said defendants; that the same has been given to the sheriff of the city and county of ——— to be served according to law; that due diligence has been used by the said sheriff to find the said defendants in his county so as to serve them therewith, and that the said defendants cannot after such diligence and inquiry, be found within this county or state, but that they reside in ———, as appears by the certificate or return of the said sheriff hereto annexed.

That the said defendants have property within this state, to wit, the said mortgaged premises hereinbefore referred to.[65]

If defendant has been absent from the state for more than six months an affidavit based on such ground should state the requisite facts as set forth in subdivision 3 of section 438 of the Code and the fact that there has been no designation of a party on whom service may be made should be shown by a certificate of the clerk of the county where the defendant resides.

——**Filing.** As will be more fully stated hereafter,[66] the affidavit, inter alia, must be filed with the clerk on or before the first day of the publication.

ART. III. ORDER.

§ 741. Necessity.

Service by publication can not be made except in pursuance of an order of a judge.

§ 742. Who may make.

The order may be made by a judge of the court, or the county judge of the county where the action is triable.[67] It

[65] This affidavit was held sufficient in Belmont v. Cornen, 82 N. Y. 256.

[66] See post, § 747.

[67] Code Civ. Proc. § 440.

can not be made by the court at special term, but it seems that a special term caption to an order, otherwise in proper form and signed with the initials of the judge with a direction to enter, may be disregarded[68] and a formal amendment be permitted.[69] But an order made by the "court" cannot be cured by an order afterwards made by a judge nunc pro tunc.[70]

§ 743. Contents.

The order must direct that service of the summons on the defendant named or described in the order be made by publication thereof in two newspapers designated in the order as most likely to give notice to defendant, for a specified time, which the judge deems reasonable, not less than once a week for six successive weeks; or, at the option of the plaintiff, by service of the summons and of a copy of the complaint and order without the state, upon the defendant personally, and if he is an infant under the age of fourteen years, also upon the person with whom he is sojourning, or if the defendant is a corporation, upon an officer thereof on whom personal service might be made within the state. The order must also contain a direction that on or before the day of the first publication, the plaintiff deposit in a specified post office one or more sets or copies of the summons, complaint and order each contained in a securely closed postpaid wrapper, directed to defendant at a place specified in the order, or else a statement that the judge, being satisfied by the affidavits on which the order was granted that the plaintiff cannot, with reasonable diligence, ascertain a place or places where the defendant would probably receive matter transmitted through the post office, dispenses with the deposit of any papers therein.[71]

If the order is a substantial compliance with the statute, it is sufficient.[72] Harmless errors in the order will be disregarded

[68] Crosby v. Thedford, 7 Civ. Proc. R. (Browne) 245.

[69] Volz v. Steiner, 67 App. Div. 504; Mojarrieta v. Saenz, 80 N. Y. 553; Regan v. Traube, 16 Daly, 152, 18 Civ. Proc. R. (Browne) 332, 30 State Rep. 851.

[70] Schumaker v. Crossman, 12 Wkly. Dig. 99.

[71] Code Civ. Proc. § 440.

[72] Brooke v. Saylor, 44 Hun, 554; Van Wyck v. Hardy, 4 Abb. App. Dec. 496.

as where the order erroneously recited that a copy of the summons was annexed but was followed by a publication of the proper summons.[73] So failure to designate the particular officer of a foreign corporation upon whom service shall be made without the state does not vitiate such order, where service is actually made on a proper officer.[74] And a slight clerical error in the first name of a defendant in an order for publication of a summons, does not vitiate, the name being properly stated in the other papers.[75]

The order need not state that the affidavits, on which the order was granted, afforded satisfactory evidence of the requisite facts,[76] nor that the two papers designated are "most likely to give notice to the defendants."[77]

—— **Directing service in the alternative.** While the order "may" direct service both by publication and by personal service out of the state, it is not necessary that it embody the two alternative modes of service.[78] Furthermore, even if the order is in the alternative it may be good as an order for personal service of summons though it is not good as an order for publication.[79]

—— **Directing mailing of copies.** If service is to be made by publication, the order must direct a depositing in the mail as before stated. But if personal service is to be made without the state, the order need not direct mailing.[80] Furthermore,

[73] Von Rhade v. Von Rhade, 2 Thomp. & C. 491.

[74] Morrison v. National Rubber Co., 13 Civ. Proc. R. (Browne) 233.

[75] McCully v. Heller, 66 How. Pr. 468.

[76] Barnard v. Heydrick, 49 Barb. 62, 2 Abb. Pr., N. S., 47; Brainerd v. Heydrick, 32 How. Pr. 97.

[77] Green v. Squires, 20 Hun, 15; Schroeder v. Lear, 17 Wkly. Dig. 574.

[78] Matter of Field, 131 N. Y. 184; overruling [Ritten v. Griffith, 16 Hun, 454; Johenning v. Johenning, 3 Month. Law Bul. 60, 1 Civ. Proc. R. (McCarty) 144, 145, note; Strong v. Spittlehouse, 2 Month. Law Bul. 10; Mercer v. Southern Bank, 1 Civ. Proc. R. (McCarty) 144, note, N. Y. Daily Reg., April 12, 1881].

[79] Sabin v. Kendrick, 2 App. Div. 96, 73 State Rep. 213, 25 Civ. Proc. R. (Scott) 280; Kennedy v. Arthur, 18 Civ. Proc. R. (Browne) 390, 33 State Rep. 147, which, in effect, overrule Walter v. De Graaf, 11 State Rep. 274, 19 Abb. N. C. 406; Fetes v. Volmer, 28 State Rep. 317.

[80] Kennedy v. Arthur, 33 State Rep. 147, 18 Civ. Proc. R. (Browne) 390.

if the affidavits show that the address of defendant can not be obtained, the order may dispense with a mailing.[81] Such order is sufficient, although, after referring to the affidavits made, it does not state, in the clause dispensing with notice through the post office, that it satisfactorily appeared to the justice by the affidavits on which the order was granted that the plaintiff could not ascertain the residence of the defendant.[82] Where it appears merely that defendant has departed from his residence outside the state, the order can not dispense with a mailing.[83]

It will be observed that not only a copy of the summons and complaint, but also of the order, must be mailed. Furthermore the mailing must be on or before the first day of publication.[84] The particular post office must be designated.[85] But a direction to mail copies of the summons and complaint directed to named defendants, is not objectionable in that it does not specifically require a set of copies of the papers to be separately mailed to "each" of the defendants.[86] Likewise, the omitting the names of defendants in the direction to mail, where the order is otherwise complete, is not fatal.[87]

—— Form of order.

The plaintiff having presented to me the verified complaint in this action (a copy of which is hereto annexed), showing a sufficient cause of action, for which judgment is therein demanded against the defendant ———[88] and having also, by the annexed affidavit of ——— dated the ——— day of ———, 19—, made proof to my satisfaction * * *[89] and that personal service of the summons herein cannot,

[81] Code Civ. Proc. § 440; Walker v. Reiff, 13 Wkly. Dig. 331.

[82] Green v. Squires, 20 Hun, 15.

[83] Warren v. Tiffany, 17 How. Pr. 106, 9 Abb. Pr. 66; Hyatt v. Wagenright, 18 How. Pr. 248; Towsley v. McDonald, 32 Barb. 604.

[84] McCool v. Boller, 14 Hun, 73; Eleventh Ward Bank v. Powers, 43 App. Div. 178.

[85] Ver Planck v. Godfrey, 31 Misc. 54; affirmed in 49 App. Div. 648, 63 N. Y. Supp. 1117.

[86] Littlejohn v. Leffingwell, 34 App. Div. 185.

[87] Brooke v. Saylor, 44 Hun, 554.

[88] Name defendant or defendants to be served, if known. If unknown, add description. If the action affects specific property (Code Civ. Proc. § 438, subd. 5) add the nature of the relief sought.

[89] Here insert the facts deemed proven by the affidavit or affidavits.

after due diligence, be made on said defendant within this State,[90] now on motion of ———, plaintiff's attorney:

Ordered, that service of summons in the above entitled action on the defendant ———[91] be made by publication thereof (with the notice required by law), in two newspapers, to wit: In the * * *[92] published in the ——— and the ——— published in ——— once a week for six successive weeks, said newspapers being hereby designated as most likely to give notice to the defendant , to be served, or at the option of the plaintiff , by service of the summons, and a copy of the complaint and of this order (with the notice required by law), upon said defendant , personally, without the State, if of full age, or infant of the age of fourteen years or upwards.[93] And it is further ordered and directed, that on or before the day of the first publication of the summons the plaintiff cause to be deposited in the post office at ——— a copy of the summons and complaint herein and of this order, contained in a securely closed post-paid wrapper, directed to the following named defendant , respectively, at the places designated below, viz.:[94]

For instance if defendant is a non-resident, insert after the word "satisfaction" this clause: "that said defendants are not residents of this state." (See form in Sabin v. Kendrick, 2 App. Div. 96.) If the ground is concealment, so state. If defendant to be served is a foreign corporation state where created and its principal place of business.

[90] This clause is to be added only where the grounds for the order are embraced in subdivisions 1, 4, 5, 6 of section 438 of the Code.

[91] Name defendant or defendants to be served.

[92] Insert name of paper.

[93] If defendant to be served is a foreign corporation, state officers on whom service may be made according to section 432 of the Code.

If copy is to be delivered to another person than defendant, where defendant is under fourteen or judicially declared incompetent, as provided for by subdivision 7 of section 438 of the Code, add a further direction for service on such person.

[94] Insert name of defendants to be served with their addresses.

If defendant's address cannot be ascertained insert the following in place of the direction for mailing: "And it satisfactorily appearing to me [by the affidavits of ———] that the plaintiff cannot, with reasonable diligence, ascertain a place or places where the defendants * * * who are unknown to the plaintiff, would probably receive matter transmitted through the post-office, the deposit of any papers therein, directed to said defendants is dispensed with." (See Green v. Squires, 20 Hun, 15, from which this clause is copied except that the words "by the affidavits of ———" are added as a matter of precaution.)

§ 744. Vacating or setting aside order.

If the order is deemed to have been improperly granted, the proper practice is for defendant to specially appear by attorney and move to set aside the order. By limiting the appearance to a special appearance no question of waiver can be raised by plaintiff.[95] The motion should not be based on the ground that judgment cannot be entered by default because no property has been attached, where there has been no attempt to enter judgment.[96] The notice of motion must specify the irregularities, if any, complained of.[97] On the hearing of the motion, the right of plaintiff to recover should not be determined unless it is apparent from a bare inspection of the complaint that it is frivolous.[98] The validity of the order can be sustained only by the moving papers.[99]

§ 745. Collateral attack.

If there is enough in the affidavits to call for the exercise of judicial discretion, neither the order nor the judgment based thereon can be impeached collaterally.[100]

§ 746. Second order.

One who has obtained an order for service by publication and has received notice that defendants will move to vacate it on account of the insufficiency of the affidavits, may obtain a second order pending the hearing of the motion.[101]

[95] Von Hesse v. Mackaye, 55 Hun, 365, 29 State Rep. 228, 233, 234.

[96] Clarke v. Boreel, 21 Hun, 594.

[97] O'Neill v. Bender, 13 Wkly. Dig. 47.

[98] Montgomery v. Boyd, 65 App. Div. 128, 10 Ann. Cas. 279.

[99] Wortman v. Wortman, 17 Abb. Pr. 66. But see Howe Mach. Co. v. Pettibone, 12 Hun, 657.

[100] Von Rhade v. Von Rhade, 2 Thomp. & C. 491; Belmont v. Cornen, 82 N. Y. 256; followed Walker v. Reiff, 13 Wkly. Dig. 331; Bingham v. Bingham, 3 How. Pr., N. S., 166; Denman v. McGuire, 101 N. Y. 161; Wichman v. Aschpurwis, 55 Super. Ct. (23 J. & S.) 218, 18 State Rep. 339, 14 Civ. Proc. R. (Browne) 88, 28 Wkly. Dig. 63; Donnelly v. West, 66 How. Pr. 428.

[101] Littlejohn v. Leffingwell, 34 App. Div. 185.

ART. IV. FILING OF PAPERS.

§ 747. Necessity.

Where service is made by publication or by service without the state, the summons, complaint and order and the papers on which the order was made, must be filed with the clerk on or before the day of the first publication or the day of service.[102] This Code provision is mandatory and compliance therewith is necessary to confer jurisdiction. Where the order alone is filed, the proceedings will be set aside.[103]

—— Form of affidavit of filing.

[Title and venue.]

X, being duly sworn, says that he is ——— and that on the ——— day of ——— he filed the summons and verified complaint in the above entitled action, together with the order of publication dated the ——— day of ——— and the affidavits on which such order was granted, in the office of the clerk of ———.

[Jurat.] [Signature.][104]

ART. V. PUBLICATION AND SERVICE WITHOUT THE STATE.

§ 748. Time for first publication or service.

The first publication in each newspaper designated in the order, or the service upon the defendant without the state, must be made within three months after the order is granted.[105]

§ 749. Sufficiency of published summons.

An order for publication of summons is satisfied by the publication of a copy substantially correct,[106] and it is not necessary that the names of all the defendants be set forth.[107] It is enough if the designation, in the summons published, of the place for serving the answer is as specific as is usual in or-

[102] Code Civ. Proc. § 442.

[103] Whiton v. Morning Journal Ass'n, 23 Misc. 299 which held, however, that it was not proper to set aside the order but only the proceedings under the order.

[104] When the publication is complete, this affidavit should be filed as part of the proof.

[105] Code Civ. Proc. § 441.

[106] Van Wyck v. Hardy, 4 Abb. App. Dec. 496, 39 How. Pr. 392.

[107] Brenen v. North, 7 App. Div. 79, 25 Civ. Proc. R. (Scott) 398.

dinary correspondence between individuals in relation to the most important business.[108] But omitting to state in the summons as published the time and place of filing is fatal to the judgment.[109] If the action is a matrimonial action, the words "action to annul a marriage," "action for a divorce," or "action for a separation" must be written or printed on the face of the summons.[110]

Notice. A notice, subscribed by the plaintiff's attorney, and directed only to the defendant or defendants to be served, substantially in the following form, the blanks being properly filled up, must be subjoined to, and published with the summons:

"To ———: The foregoing summons is served upon you, by publication, pursuant to an order of ———" (naming the judge and his official title), "dated the ——— day of ———, 19—, and filed with the complaint, in the office of the clerk of ———, at ———."[111]

If the action is one of partition and summons is served on unknown owners by publication, the notice must, in addition, briefly state the object of the action and describe the property.[112]

Formal defects in the notice, which are not prejudicial or misleading, such as a clerical error in the recital of the name of the justice in the notice,[113] or that the notice was not subscribed by the attorney and that it omitted to state the day on which the order was made, where an attachment had been issued and served,[114] or a statement in the notice that the summons was served without the state of New York instead of a statement that it was served by publication,[115] do not deprive the court of its jurisdiction.

108 Van Wyck v. Hardy, 4 Abb. App. Dec. 496, 39 How. Pr. 392.
109 Kendall v. Washburn, 14 How. Pr. 380.
110 Code Civ. Proc. § 1774.
111 Code Civ. Proc. § 442.
112 Code Civ. Proc. § 1541.
113 La Farge v. Mitchell, 4 Month. Law Bul. 36.
114 Orvis v. Goldschmidt, 2 Civ. Proc. R. (Browne) 314, 64 How. Pr. 71.
115 Loring v. Binney, 38 Hun, 152.

§ 750. The newspaper.

Publication in a different newspaper from that designated is void regardless of whether defendant was prejudiced thereby.[116]

§ 751. Period of publication.

The requirement of publication not less than once a week for six successive weeks, requires a full six weeks' publication, and not merely six publications in six different weeks.[117] Six publications are held sufficient though the provision that service shall be complete "on the day of the last publication" might well be construed as requiring seven publications.[118] There must be a publication each week. Hence if the first publication is on Monday, but on account of a subsequent Monday being a holiday the publication for that Monday is made on the preceding Saturday, it is insufficient, since there are two publications in one week and none in the following week.[119] But the summons need not be published on the same day of each week[120] nor need the publication in the two newspapers proceed absolutely concurrently; the first insertion may be on even the last day of the first of the six weeks, and the last even on the first day of the last week, and the service will be com-

116 Brisbane v. Peabody, 3 How. Pr. 109.

But where the order directed the publication to be made in the "'Daily Transcript" and the summons was published in the "Buffalo Daily Trauscript," there being no other paper in the city of a similar name, a compliance with the order was shown. Waters v. Waters, 7 Misc. 519, 64 State Rep. 371, 27 N. Y. Supp. 1004.

Publication in state paper, in addition to two newspapers, where defendant was a foreign corporation, was deemed unnecessary under L. 1885, c. 262. Lanier v. City Bank of Houston, 9 Civ. Proc. R. (Browne) 161.

As to what is a "newspaper," see Williams v. Colwell, 26 Civ. Proc. R. (Scott) 66, 18 Misc. 399 which reviews the authorities in other states.

117 Market Nat. Bank v. Pacific Nat. Bank of Boston, 89 N. Y. 397; Waters v. Waters, 7 Misc. 519.

118 Young v. Fowler, 73 Hun, 179, 56 State Rep. 92.

119 Doheny v. Worden, 75 App. Div. 47.

120 Market Nat. Bank v. Pacific Nat. Bank of Boston, 89 N. Y. 397.

plete after forty-two days from the date of the first insertion in the newspaper last making publication.[121]

§ 752. Effect of death pending publication.

Where service by publication is attempted but is uncompleted at the time of the death of the plaintiff trustee, further publication is inoperative until proper amendment by bringing in the successor in interest[122] and then must be commenced de novo and continued for the requisite six weeks.[123] So jurisdiction is lost by the death of defendant before the completion of the publication.[124]

§ 753. Mailing copy of summons, complaint and order.

In the absence of an order excusing notice by mailing, as provided for by the Code,[125] the plaintiff must, on or before the day of the first publication, deposit in the post office specified in the order authorizing service by publication, a copy of the summons, complaint and order, each contained in a securely closed postpaid wrapper, directed to defendant at the place specified in the order.[126] If defendant is an infant under fourteen or an adjudged incompetent, service by publication and mailing may be made on parent, guardian, committee or other person representing him, pursuant to order, as if such repre-

[121] Herbert v. Smith, 6 Lans. 493.

[122] Paget v. Pease, 17 Civ. Proc. R. (Browne) 234, 23 Abb. N. C. 290, 24 State Rep. 762.

[123] Reilly v. Hart, 130 N. Y. 625.

[124] Ludwig v. Blum, 43 State Rep. 616; Barron v. South Brooklyn Saw Mill Co., 18 Abb. N. C. 352.

[125] See ante, § 737.

[126] See ante, § 737, and Code Civ. Proc. § 440.

Formerly the mailing was required to be "forthwith." Back v. Crussell, 2 Abb. Pr. 386; Hyatt v. Wagenright, 18 How. Pr. 248; Van Wyck v. Hardy, 4 Abb. App. Dec. 496, 39 How. Pr. 392.

Where the affidavit for publication states that the nonresident resides in one place, and the affidavit of mailing the summons and complaint shows that it was directed to another place, and there is no evidence of the residence of the defendant there; nor of personal service on him, the court acquired no jurisdiction, and a judgment against such a defendant is void. Smith v. Wells, 69 N. Y. 600.

sentative was the defendant.[127] Of course, if personal service is made without the state there is no need of a mailing. That the papers are mailed before filing the order does not invalidate the proceedings.[128]

§ 754. Personal service without the state.

Upon an order for service of summons by publication upon a nonresident defendant, personal service out of the state gives jurisdiction the same as if made by publication[129] and makes unnecessary a publication, and a depositing of summons in the post office,[130] but does not shorten the time to answer[131] as it is a mere substitute for publication and mailing and can have no greater effect.[132]

Personal service without the state is, however, of no effect unless the order for service by publication is based on affidavits sufficient to confer jurisdiction to grant the order[133] though, as has been stated, the order may be insufficient as an order for publication but sufficient as an order authorizing personal service.

With the copy of the summons must be served not only a copy of the complaint but also a copy of the order for the publication of the summons.[134] Where service is made without the state, a notice in all respects like the notice required to be published with the summons where the service is by publication, is required, except that the words, "without the state of New

[127] Code Civ. Proc. § 438, subd. 7.

Under the old Code service by publication and mailing was sufficient as against an infant defendant under fourteen, without mailing a copy to parent or guardian. Home Ins. Co. v. Head, 30 Hun, 405.

[128] Silleck v. Heydrick, 2 Abb. Pr., N. S., 57.

[129] Jenkins v. Fahey, 73 N. Y. 355.

[130] Abrahams v. Mitchell, 8 Abb. Pr. 123; McCully v. Heller, 66 How. Pr. 468; Matthews v. Gilleran, 35 State Rep. 269.

[131] Kerner v. Leonard, 15 Abb. Pr., N. S., 96; Market Nat. Bank v. Pacific Nat. Bank of Boston, 89 N. Y. 397; Brooklyn Trust Co. v. Bulmer, 49 N. Y. 84.

[132] Fiske v. Anderson, 12 Abb. Pr. 8, 33 Barb. 71.

[133] Peck v. Cook, 41 Barb. 549.

[134] Failure to serve the order is a jurisdictional defect. Ludden v. Degener, 14 App. Div. 397, 77 State Rep. 908.

York" must be substituted for the words, "by publication."[135] But the omission of the words "without the state" from the notice attached to the summons, is not fatal[136] nor is the use of the words "by publication" instead of "without the state."[137]

§ 755. When service deemed complete.

For the purpose of reckoning the time within which defendant must appear or answer, service by publication is complete on the day of the last publication, pursuant to the order.[138] Service made without the state is complete on the expiration thereafter of a time equal to that prescribed for publication, i. e., six weeks after the service is made.[139] After the expiration of said periods, defendant has twenty days in which to appear and defend, as where the service is personal within the state. And the fact that defendant returns to the state, before the time for publication expires, does not affect plaintiff's right to enter judgment upon his default, or require personal service of the summons upon him; and he can be permitted to come in and defend only as a matter of favor.[140]

ART. VI. RIGHT OF DEFENDANT TO DEFEND BEFORE OR AFTER FINAL JUDGMENT.

§ 756. Code rule and construction thereof.

If the defendant served with summons does not appear, he or his representative, on application and sufficient cause shown, must be allowed, at any time before final judgment, to defend the action.[141] Except in an action for divorce, or wherein the contrary is expressly prescribed by law, the defendant, or his representative, must, in like manner, upon good cause shown, and upon just terms, be allowed to defend, after final judgment, at any time within one year after personal service of written notice thereof; or, or if such a notice has not been serv-

135 Code Civ. Proc. § 442.
136 McCully v. Heller, 66 How. Pr. 468.
137 Thistle v. Thistle, 66 How. Pr. 472, 5 Civ. Proc. R. (Browne) 43.
138 Code Civ. Proc. § 441.
139 Code Civ. Proc. § 441.
140 Duche v. Voisin, 18 Abb. N. C. 358.
141 Code Civ. Proc. § 445.

ed, within seven years after the filing of the judgment-roll. If the defence is successful, and the judgment, or any part thereof, has been collected or otherwise enforced, such restitution may thereupon be compelled, as the court directs; but the title to property, sold, to a purchaser in good faith, pursuant to a direction contained in the judgment, or by virtue of an execution issued upon the same, shall not be affected thereby.[142] It seems, however, that this statutory remedy of restitution is not exclusive of the common law remedy[143] and that the provision as to divorce does not deprive the courts of power to open defaults in divorce suits where summons is served by publication.[144]

The word "must," as used in this statute, is mandatory and it is not incumbent on the applicant to show any irregularity in the proceedings had against him or any defect in the judgment from which he seeks to be relieved, though the applicant must show sufficient cause for the granting of the application.[145] The order granting the motion may impose terms where the motion is made before final judgment and "must" impose terms where made thereafter.[146]

[142] Code Civ. Proc. § 445; Place v. Riley, 98 N. Y. 1.
[143] Haebler v. Myers, 132 N. Y. 363.
[144] Brown v. Brown, 58 N. Y. 609.
[145] Marvin v. Brandy, 56 Hun, 242.
[146] Marvin v. Brandy, 56 Hun, 242.

CHAPTER V.

PROOF OF SERVICE.

ART. I. PROOF OF PERSONAL SERVICE WITHIN THE STATE.

§ 757. Three modes of proof.

Proof of personal service of process within the state must be made by affidavit, by certificate, or by admission.[1]

[1] Code Civ. Proc. § 433.

§ 758. General rules applicable to proof.

A certificate, admission, or affidavit of service of a summons, must state the time and place of service.[2] If the summons served is indorsed[3] or is accompanied by a notice, complaint, or other paper, such facts should be made to appear by the affidavit or certificate.

Trivial mistakes, such as a misspelling of a name,[4] where it can be clearly seen that the right person was served and that the service was properly made, will be disregarded.

A certificate or affidavit of service, while not conclusive when the service is directly attacked,[5] can be overcome only by clear testimony.[6]

§ 759. Sheriff's certificate of service.

A certificate is allowable only where the service is made by the sheriff[7] within his territorial jurisdiction. The sheriff can not, as such, serve a summons outside of his own county and hence his "certificate" of such a service is insufficient though he may file an "affidavit" of service nunc pro tunc.[8] The certificate must identify the summons and complaint served as the summons and complaint in the action.[8] If the officer who made the service dies, it would seem that the court may allow the affidavit of his superior according to the statements, shown by

[2] Code Civ. Proc. § 434, subd. 2.

[3] People ex rel. Martin v. Walters, 15 Abb. N. C. 461.

[4] Miller v. Brenham, 68 N. Y. 83.

[5] Van Rensselaer v. Chadwick, 7 How. Pr. 297; Wallis v. Lott, 15 How. Pr. 567; Bulkley v. Bulkley, 6 Abb. Pr. 307.

The acts of sheriff in return of process, so far as the rights of parties are concerned, must be taken as true when they arise collaterally, and can only be impeached by direct proceedings, to which the officer is a party, or rectified upon a summary application to the court to correct or set aside the return. Sperling v. Levy, 1 Daly, 95, 10 Abb. Pr. 426.

[6] Mace v. Mace, 24 App. Div. 291; Sargeant v. Mead, 17 State Rep. 996, 1 N. Y. Supp. 589.

[7] Code Civ. Proc. § 434, subd. 1.

[8] Farmers' Loan & Trust Co. v. Dickson, 17 How. Pr. 477.

To same effect, see Morrell v. Kimball, 4 Abb. Pr. 352.

[9] Litchfield v. Burwell, 5 How Pr. 341.

affidavits, made by the server while sick.[10] The certificate is not functus officio on the entry of judgment but may be used on a second application for judgment.[11] If the sheriff fails or neglects to make a return within the time limited, he may be compelled to do so.[12]

An imperfect or insufficient return, or failure to subscribe the return, is not fatal[13] and the return may be amended, in the discretion of the court to which the return is made, as to matters of form, either before or after judgment.[14]

—— Form of certificate.

I hereby certify that I received the within summons [and complaint or other papers] on the ——— day of ———, and personally served them on the ——— day of ———, on defendant ———, by delivering to him personally a copy of said summons [and complaint or other papers] and leaving the same with him.

[Date.] [Signature,][15]
with word "sheriff" added.

§ 760. Affidavits of service.

Where personal service of the summons, and of the complaint or notice if any accompany the same, shall be made by any other person than the sheriff, it shall be necessary for such person to state in his affidavit of service his age, or that he is more than twenty-one years of age; when, and at what particular place, and in what manner he served the same, and that he knew the person served to be the person mentioned and described in the summons as defendant therein, and also to state in his affidavit that he left with defendant such copy, as well as delivered it[16] to him. If the service is on an officer of a corporation, the affidavit must state that he "is" a specified officer

10 Barber v. Goodell, 56 How. Pr. 364.
11 Brien v. Casey, 2 Abb. Pr. 416.
12 Rule 6 of General Rules of Practice.
13 Code Civ. Proc. § 721, subd. 3.
14 Code Civ. Proc. § 725.
15 If the action is a matrimonial action, this certificate should be accompanied with an affidavit of the officer stating that he knew the person served to be the person named as defendant in the summons and showing the source of his knowledge. (See post, p. 787.)
16 Rule 18 of General Rules of Practice.

and not that he knew the person served "to have been" the said officer.[17] It is not necessary, however, for the affidavit to state how the affiant knew the person served was the officer or managing agent of the corporation.[18] An affidavit is not defective in omitting to state the age of the affiant where it appears he is the plaintiff's attorney, as the court will take judicial notice of the fact that he is full age.[19] So it seems, in such a case, that failure to state the residence of the affiant is not fatal where the fact appears from the summons.[20] It is not sufficient to allege that the summons and complaint were served "on or about" a certain day.[21]

The affidavit of the person who served the summons is not requisite if there is other competent proof of such service, and a third person who swears unequivocally and positively to the fact is to be presumed to have done so from actual knowledge of the service.[22] For example, an affidavit of service by the person effecting it is unnecessary where there is a petition for the appointment of a guardian for infant defendants, which alleges that the action has been begun against them, since such petition furnishes sufficient proof of service upon them to give the court jurisdiction.[23] But an affidavit of service of summons, made by an attorney and founded on information received from his clerk, who made the alleged service, but without proof that the clerk knew the person served to be the defendant, and that he left with him the summons, etc., and without stating the place and manner of service, is insufficient, and judgment entered thereon is without jurisdiction.[24] The recital of service in the judgment is prima facie evidence of the fact of service, and of itself sufficient when the judgment is attacked collaterally, to show that the court acquired jurisdiction.[25]

17 Cameron v. United Traction Co., 67 App. Div. 557.
18 Glines v. Supreme Sitting Order of Iron Hall, 50 State Rep. 281.
19 Booth v. Kingsland Ave. Bldg. Ass'n, 18 App. Div. 407.
20 Booth v. Kingsland Ave. Bldg. Ass'n, 18 App. Div. 407.
21 Hickey v. Yoelin, 4 Month. Law Bul. 70.
22 Murphy v. Shea, 143 N. Y. 78.
23 Steinhardt v. Baker, 20 Misc. 470.
24 Spaulding v. Lyon, 2 Abb. N. C. 203.
25 Mapes v. Mackey, 89 N. Y. 146.

A defective affidavit of service of summons and complaint is an irregularity which can be remedied at any time by leave of court, by filing a new affidavit of service, and is not ground for setting aside the decree, especially where the record clearly shows that the summons and complaint were actually served upon the defendant.[26]

—— **In matrimonial actions.** In actions for divorce, or to annul a marriage, or for separate maintenance, the affidavit, in addition to the facts required in other affidavits of service, should state what knowledge the affiant had of the person served being the defendant and proper person to be served, and how he acquired such knowledge. The court may require the affiant to appear in court and be examined in respect thereto, and when service has been made by the sheriff, the court must require the officer who made the service to appear and be examined in like manner, unless there shall be presented with the certificate of service the affidavit of such officer, that he knew the person served to be the same person named as defendant in the summons, and shall also state the source of his knowledge.[27] An affidavit that the server has known defendant for about one year and that defendant admitted that he was the husband of the plaintiff, is probably sufficient,[28] as is the affidavit of a brother of plaintiff who states that he knows defendant very well, though in the latter case, on account of the close relationship of the affiant to plaintiff, he should be called as a witness and examined on the subject.[29] But where the server of the summons identified defendant from a photograph, the person served admitted that he was the defendant, and a bystander, not called as a witness, told the server that such was the fact, the proof of service was held insufficient.[30]

[26] Robertson v. Robertson, 9 Daly, 44.

On motion to vacate a judgment for an irregularity or informality in the proof of service attached to the judgment roll, such defect may be cured by amendment. Maples v. Mackey, 89 N. Y. 146.

[27] Rule 18 of General Rules of Practice.

[28] Fowler v. Fowler, 29 Misc. 670.

[29] Fawcett v. Fawcett, 29 Misc. 673.

[30] Randall v. Randall, 29 Misc. 423, 94 State Rep. 718, 7 Ann. Cas. 45.

—— Forms of affidavits.

[Title.]
County of ———, ss.:

X, being duly sworn, says that he is ——— the age of ——— years, and that on the ——— day of ———, 19—, at ——— he served the annexed [or within] summons and [here insert names of papers served with summons, if any], on ———— defendant in this action, by delivering a copy of the same to ——— such defendant personally, and leaving the same with ———. He further says, that he knew the person served as aforesaid to be the person mentioned and described in the said summons as ——— defendant in this action.

Sworn to before me, this ——— day of ———, 19—.

[Signature.][31]

If defendant refuses to receive the summons, the affidavit may be something as follows:

"I went to the address (The New York Yacht Club Rooms), and inquired for said defendant of a servant in the hallway, and while speaking with said servant the said defendant came out of an adjoining room into said hallway. I immediately started towards said defendant, but was prevented from reaching him by the said servant, who placed himself in front of me and held me back. I called to the said defendant, who was in the act of returning to said room, stating that I had a summons to serve on him, at the same time making an effort to free myself from the said servant. Seeing I could not do this in time to intercept said defendant, I threw the papers (i e., the summons and said copy of said complaint) at said defendant, at the same telling him that I served him with said papers. The papers did not actually touch defendant's person, but they fell within a few feet of him. I left said papers lying where I had thrown them. When I called to said defendant, he stopped for a moment and said 'I can't attend to those matters here; call at my office tomorrow, and I will see

[31] If defendant is under fourteen or is an adjudged incompetent, state that service is made on both the defendant and his guardian, committee or other representative by leaving a copy with each.

If defendant is a corporation, add that the person to whom summons was delivered was known to be "at such time" an officer, naming the office, in the defendant corporation.

you,' or words to that effect. I know the person served as aforesaid, to be the person,'' etc.[32]

§ 761. Admission of service.

"A written admission is sufficient to prove service on a defendant who is an adult and who has not been judicially declared to be incompetent to manage his own affairs. The admission must be signed by him and either acknowledged by him and certified in like manner as a deed to be recorded in the county or accompanied with the affidavit of a person other than the plaintiff,[33] showing that the signature is genuine.[34] A written admission of a service of a summons, or of a paper accompanying the same, imports, unless otherwise expressly stated therein, or otherwise plainly to be inferred from its contents, that a copy of the paper was delivered to the person signing the admission.''[35] The admission must state that the service was personal,[36] the place of service,[37] that service was made within the state,[38] and should state the day of service though if the admission is dated, it is not necessary for the date of the service to be otherwise expressed.[39] The date, however, is not conclusive.[40] So failure to state the place of service renders the judgment voidable rather than void.[41] Where service is made

[32] This affidavit was held sufficient in Wright v. Bennett, 30 Abb. N. C. 65, note.

[33] Formerly it was held that plaintiff might make the affidavit. White v. Bogart, 73 N. Y. 256.

[34] But failure to add an affidavit is a mere irregularity which must be urged at the first opportunity. Jones v. United States Slate Co., 16 How. Pr. 129.

[35] Code Civ. Proc. § 434, subd. 2.

The state superintendent of insurance may admit service on behalf of a foreign insurance company. Farmer v. National Life Ass'n, 67 Hun, 119, 51 State Rep. 183.

An admission of "due and personal service" seems sufficient. Maples v. Mackey, 15 Hun, 533.

[36] Read v. French, 28 N. Y. 285.

[37] Trolan v. Fagan, 48 How. Pr. 240; Maples v. Mackey, 15 Hun, 533.

[38] Litchfield v. Burwell, 5 How. Pr. 341, 9 N. Y. Leg. Obs. 182, Code R., N. S., 42.

[39] Maples v. Mackey, 15 Hun, 533.

[40] Rogers v. Schmersahl, 2 Thomp. & C. 668.

[41] Maples v. Mackey, 15 Hun, 533.

by mail in a case proper for such service, admission of due service means due service by mail.[42] Whether the antedating the admission renders the judgment fraudulent as against creditors has been a disputed question though the later decisions hold that such act does not render the judgment fraudulent.[43]

—— Form of admission.

I hereby admit due and legal personal service of the within summons [and complaint or other annexed papers] on me this ——— day of ———, 19—, at ——— by delivering to and leaving with me a copy of said papers.

———,
Defendant.

—— Form of affidavit to verify signature of admission.

X, being duly sworn, says that he resides at ———; that he saw ———,[44] known to him personally to be the defendant, sign the above admission on the ——— day of ——— at ———.

ART. II. PROOF OF PERSONAL SERVICE WITHOUT THE STATE.

§ 762. Same as proof of service within state.

If personal service is made without the state the proof of service should be by affidavit though the service is made by the sheriff.[45] The affidavit should state substantially the same facts as are required in an affidavit of personal service within the state. The jurat should, however, be authenticated as indicated in a previous chapter.[46]

ART. III. PROOF OF SERVICE BY PUBLICATION AND MAILING.

§ 763. Code rule.

Proof of the publication of the summons and notice must be made by the affidavit of the printer or publisher or his foreman or principal clerk.[47] If the publisher or other proper

[42] People ex rel. Crandal v. Babcock, 1 How. Pr. 5.

[43] Peck v. Richardson, 9 Hun, 567; disapproving Trolan v. Fagan, 48 How. Pr. 240; Brown v. Marrigold, 50 How. Pr. 248.

[44] Insert name of defendant.

[45] The official certificate of a sheriff of another state is not evidence in this state of service of papers from the courts of our state; his affidavit should be presented. Morrell v. Kimball, 4 Abb. Pr. 352.

[46] See ante, § 541.

[47] Code Civ. Proc. § 444; Bunce v. Reed, 16 Barb. 347.

An affidavit of publication by the "manager" of a newspaper, though not described as "printer or publisher or his foreman or principal

person in his employ, refuses to make the affidavit, the remedy is by motion to compel said person to make the affidavit, as provided for in the Code,[48] and not by obtaining an order in the suit directing the newspaper by name to furnish and deliver such affidavit.[49]

Proof of deposit in the post office, or of delivery of a paper required to be deposited or delivered, must be by the affidavit of the person who deposited or delivered it.[50]

Form of affidavit of publication.

[Title and venue.]

X, being duly sworn, says that he is the ———[51] of ———, a newspaper published at ———. That the annexed summons and notice in this action have been published in said paper once in each week for six successive weeks, the first publication being on the ——— day of ——— and the last publication on the ——— day of ———.

Form of affidavit of mailing.

[Title and venue.]

X, being duly sworn, says that he is ———. That on the ——— day of ———, he deposited in the post office at ———[52] a copy of the summons, complaint and order for publication, copies of which are hereto annexed, directed to ——— at ——— and contained in a securely closed post-paid wrapper.

[Jurat.] [Signature.]

ART. IV. PROOF OF SUBSTITUTED SERVICE.

§ 764. Mode of proof and contents of affidavit.

Proof of substituted service should be made by affidavit of the person making such service and should state time and place and what was actually done, i. e., either that a copy was

clerk" was sufficient. Waters v. Waters, 7 Misc. 519, 64 State Rep. 371.

[48] Code Civ. Proc. § 885.

[49] Eberle v. Krebs, 50 App. Div. 450.

[50] Code Civ. Proc. § 444.

[51] Printer, publisher, foreman or principal clerk.

[52] Affidavit of a person that he deposited a copy of the summons and complaint "duly directed" to the defendant "at Belleville, New Jersey, and paid full postage thereon, there being a regular mail communication between the city of New York and Belleville, New Jersey," has been held sufficient to show a deposit of the summons and complaint, duly directed, etc., in the post office at New York. Steinle v. Bell, 12 Abb. Pr., N. S., 171.

left at defendant's residence or that there was a posting to the door and a mailing. So if a copy is left at the residence with a person, the better practice is to give the name of such person. The affidavit of service need not be annexed to the papers served since when proof is presented that the summons has actually been served as directed by the order, it is sufficient.[53]

Form of affidavit of service.

[Title and venue.]

———, being duly sworn, says:—That he is ———; that on ——— day of ———, at ——— street in ——— city, between the hours of ———, he served a copy of the summons, of which a copy is annexed, and a copy of the original order hereto annexed, upon ———, to the best of deponent's judgment, eighteen years of age, [who was in charge of the office of the defendant], by delivering to, and leaving with said ———, the same, and at the same time and place informing him that they were for defendant.

[Or if admittance could not be obtained or a proper person found] by affixing a copy of the summons and a copy of the order to the outer (or other) door of the defendant's residence at ——— street, ——— city, deponent not being able to obtain admittance and find a person of proper age, who would receive a copy of the summons and order, though he [here state what efforts were made to obtain admittance and find proper person].[54]

Deponent further says, that on the same day, between the hours of ———, he deposited in the general post office, ——— city, another copy of said summons, sealed in an envelope, directed to "Mr. ———, ——— street, ——— city," and paid the postage thereon.

[Jurat.] [Signature.][55]

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[53] Steinhardt v. Baker, 20 Misc. 470.

[54] An affidavit that service was made by affixing a copy, should state that the defendant had no residence there, or if he had one, that no person of suitable age and discretion on whom the service might be made, could be found there; otherwise the justice does not have jurisdiction. Beach v. Bainbridge, 7 Hun, 81.

[55] This form is, in substance, the same as found in Baker v. Stephens, 10 Abb. Pr., N. S., 1.

This last statement as to mailing need not be added where service has been made by leaving a copy. See Code Civ. Proc. § 436.

CHAPTER VI.

DEFECTS, OBJECTIONS AND AMENDMENTS.

§ 765. General considerations.

A defect or omission in the summons or in the service thereof is either jurisdictional or else a mere irregularity which may be amended or disregarded. In the one case, the summons or service thereof is void, that is it may be attacked at any time directly or indirectly; in the other case, the summons or service is merely voidable by a direct attack as by motion to set aside and is valid until so attacked. Void process is defined as such as the court has no power to award or has not acquired jurisdiction to issue in the particular case, or which does not in some material respect comply in form with the legal requisites of such process, or which loses its vitality in consequence of noncompliance with a condition subsequent, obedience to which is rendered essential.[1] If a verdict, report or decision has been rendered in a court of record, the judgment cannot be stayed nor is it impaired or affected by reason of the want of a summons, or by reason of any fault or defect in process, or by reason of misconceiving a process or awarding it to a wrong officer.[2]

[1] Fischer v. Langbien, 103 N. Y. 84.
[2] Code Civ. Proc. § 721, subds. 1. 2.

§ 766. Errors in summons.

In previous sections of this volume, the effect of specified defects, mistakes or omissions in the summons, has been incidentally considered, and the general rule to be gathered from the decisions seems to be that a defect in the summons is not fatal unless it has misled defendant. The procedure will now be considered.

——**Errors in copy where original is correct.** A defect in a copy of the summons served is not cured by the fact that the original is correct. The person served may rely on the summons served as being a true copy of the original.[3]

——**Motion to set aside summons.** Where the summons is defective in any material requisite the remedy is by motion to set aside,[4] though informalities or defects may be amended by leave of court in a proper case. Such motion is governed by the rules applicable to all motions, such as that the notice of motion must specify the grounds of the motion where the motion is based on an irregularity.[5] So if the motion is based on information and belief, it must state the source of such information and belief.[6] Under the prayer for general relief, the complaint may be set aside.[7] Questions relating to the merits cannot be considered on the hearing of the motion.[8] Setting aside the summons does not operate as a vacation of the judgment where there has been a general appearance by defendant.[9]

——**Waiver of objections.** If defendant, instead of moving to set aside a defective summons, takes any step inconsistent

[3] Bailey v. Sargent Granite Co., 23 Civ. Proc. R. (Browne) 319; Hatfield v. Atwood, 15 Civ. Proc. R. (Browne) 330, 18 State Rep. 285.

[4] Nones v. Hope Mut. Life Ins. Co., 5 How. Pr. 96, 8 Barb. 541, 3 Code R. 161; Willet v. Stewart, 43 Barb. 98; Nellis v. Rowles, 84 N. Y. Supp. 753.

[5] Perkins v. Mead, 22 How. Pr. 476.

[6] Delisser v. New York, N. H. & H. R. Co., 39 State Rep. 242, 20 Civ. Proc. R. (Browne) 312, 59 Super. Ct. (27 J. & S.) 233.

[7] Ridder v. Whitlock, 12 How. Pr. 208; Boington v. Lapham, 14 How. Pr. 360.

[8] Metcalf v. Clark, 41 Barb. 45; United States Life Ins. Co. v. Gage, 26 Abb. N. C. 16; Matthews v. Tufts, 87 N. Y. 568.

[9] Bissell v. New York Cent. & H. R. R. Co., 67 Barb. 385.

with his position, as by applying for or obtaining an extension of time to answer, or proceeding with the case in any manner that admits the jurisdiction of the court, all objections to the summons are waived. But service of summons on a party by a wrong name does not give the court jurisdiction over his person.[10] If served with summons under such wrong name, his failure to appear does not waive his right to object to the judgment and execution[11] and he may raise the question of jurisdiction in supplementary proceedings.[12]

—— **Amendments.** Before the summons issued by the attorney is served or filed he may change it at his pleasure, though a process server has no authority to strike out the name of a defendant from a summons and insert the name of another person.[13] But after issuance a summons cannot be altered without the direction of the court or of another court of competent authority,[14] though the irregularity of plaintiff amending his summons without application to the court is waived by defendant's retaining the amended summons, or may be cured in answer to a motion to strike out the amended summons, by granting a cross-motion for leave to amend it.[15]

It should be kept in mind that no amendment can be made to affect the intervening rights of third persons or to confer jurisdiction by validating that which was void. There can be no amendment of the proceedings tending to confer jurisdiction.[16]

In a previous chapter the general rules relating to amendments, as laid down by the Code, have been stated,[17] and the effect of omissions or irregularities in the summons, or in the service thereof, has been already incidentally considered in this chapter. The Code provides[18] that the court may, upon

[10] Farnham v. Hildreth, 32 Barb. 277; Fischer v. Hetherington, 11 Misc. 575, 66 State Rep. 178.

[11] Farnham v. Hildreth, 32 Barb. 277.

[12] McGill v. Weill, 19 Civ. Proc. R. (Browne) 43.

[13] Board Com'rs of Charities, etc., v. Litzen, 1 City Ct. R. 374.

[14] Code Civ. Proc. § 727; Mapes v. Brown, 14 Abb. N. C. 94.

[15] Mapes v. Brown, 14 Abb. N. C. 94.

[16] Hallett v. Righters, 13 How. Pr. 43.

[17] See ante, §§ 681-686.

[18] Code Civ. Proc. § 723.

the trial or at any other stage of the action, before or after judgment, in furtherance of justice and on such terms as it deems just, amend, inter alia, any process or other proceeding by adding or striking out the name of a person as a party, or by correcting a mistake in the name of a party or a mistake in any other respect. Pursuant to this rule, as already stated, an amendment of the summons may be allowed to correct mere irregularities therein, such as a failure to name the county, or the time when defendant must appear, or by substituting an attorney's name for that of another who had signed the summons, or by adding the address of the attorney thereto.[19] In construing this Code rule, it has been held that where one person or corporation is sued, another and different person upon whom summons has not been served, cannot be brought in as a sole defendant by way of substitution.[20] Nor can an entire change of persons plaintiff be affected by amendment.[21] This rule does not, however, prevent the bringing in of the proper party where there has been a misnomer, as where a defendant is sued as a domestic corporation when, in fact, it was an unincorporated association doing business under substantially the same name.[22] Nor does it prevent an amendment by striking out the name of a person, "as president of," an association or corporation and inserting the name of the association or corporation as plaintiff.[23] So where a voluntary unincorporated association is named as defendant in the summons an amendment changing defendant's name to that of its president is not a change of defendants and hence is allowable.[24] This Code rule has been applied by permitting a correction of a defect in the name of defendant[25] and the changing the character in which a party is

[19] See ante, §§ 765-767.

[20] New York State Monitor Milk Pan Ass'n v. Remington Agricultural Works, 89 N. Y. 22; Bassett v. Fish, 75 N. Y. 303.

[21] Davis v. City of New York, 14 N. Y. (4 Kern.) 506, 528.

[22] Munzinger v. Courier Co., 82 Hun, 575, 1 Ann. Cas. 32; Evoy v. Expressmen's Aid Soc., 51 State Rep. 38, 21 N. Y. Supp. 641.

[23] Dean v. Gilbert, 92 Hun, 427.

[24] McKane v. Democratic General Committee of Kings County, 21 Abb. N. C. 89.

[25] Stuyvesant v. Weil, 167 N. Y. 421.

sued,[26] and by striking out the name of a receiver and inserting the name of the corporation,[27] and vice versa[28] and by striking out the words "& Son" and inserting the name of the son as partner.[29] If defendant is sued as a corporation, the summons may be amended by inserting the names of defendants as partners.[30] An amendment is proper where an action is brought by the proper person under a wrong name[31] or description.[32] The name of an infant may be substituted as plaintiff for that of his guardian ad litem where defendant is not misled thereby.[33] So the court may strike out the name of a co-plaintiff[34] or of a co-defendant.[35] If a fictitious name has been inserted in the summons, or if a party has been described as unknown, as permitted by the Code,[36] the court is required, when the name or person becomes known, to make an order, on such notice and terms as it prescribes, that the proceedings already taken be deemed amended by the insertion of the true name. Several real names may be substituted for a single fictitious name.[37] But an amendment should not be allowed after trial where the effect will be to charge defendants personally in respect to a dispute carried on by them solely as representatives.[38]

An application for leave to amend should be on notice where there has been a general appearance.[39] An amendment of the

[26] Designation of defendant sued as an individual may be changed to his representative capacity. Tighe v. Pope, 16 Hun, 180; Alker v. Rhoads, 73 App. Div. 158.

[27] Abbott v. Jewett, 25 Hun, 603.

[28] Hulbert Bros. & Co. v. Hohman, 22 Misc. 248.

[29] Bannerman v. Quackenbush, 11 Daly, 529.

[30] Skoog v. New York Novelty Co., 4 Civ. Proc. R. (Browne) 144.

[31] Bank of Havana v. Magee, 20 N. Y. 355.

[32] Taylor v. Gurnee, 26 Hun, 624.

[33] Kaplan v. New York Biscuit Co., 5 App. Div. 60; Spooner v. Delaware, L. & W. R. Co., 115 N. Y. 22.

[34] Lapham v. Rice, 55 N. Y. 472.

[35] Ackley v. Tarbox, 31 N. Y. 564.

[36] Code Civ. Proc. § 451.

[37] Betts v. Betts, 4 Abb. N. C. 317, 323, note.

[38] Van Cott v. Prentice, 35 Hun, 317.

[39] Hewitt v. Howell, 8 How. Pr. 346.

summons may be allowed under a prayer for general relief in a motion[40] and may be granted to defeat a motion to set aside the complaint for departing from summons in respect to the demand.[41] Delaying service of complaint for two years after service of summons is not a fatal objection to plaintiff's application for leave to amend his summons.[42]

§ 767. Errors in service of summons.

It often happens that while there has not been a strict compliance with statutory requisites the law has been substantially complied with, and an attempted service has resulted in actual notice of the action commenced. In such cases, the object of the statute has been practically accomplished, but the proceedings, being irregular, are voidable in a direct proceeding at the option of the defendant.

——**Motion to vacate service.** While objections to the jurisdiction may be taken by demurrer or answer, the general remedy in cases of defective or irregular service is by motion to set aside the service, and a failure to make such motion, or an appearance for the purpose of answering or demurring, is generally a waiver of the irregularity in question. Thus the objection that the summons in an action by a private person to recover the amount of a penalty or forfeiture was not served by the sheriff as required by statute can be taken only by motion before service of the answer.[43] A motion for this purpose must be seasonably made to the court in which the application was originally pending, and by the service of a notice of motion, and an affidavit stating the defects complained of, as prescribed by the statutes and rules of court governing motions. The presumption that the service was regular which arises from the return of the officer, is rebuttable by affidavits.

[40] Walkenshaw v. Perzel, 32 How. Pr. 310, 30 Super. Ct. (7 Rob.) 606.

[41] Norton v. Cary, 14 Abb. Pr. 364, 23 How. Pr. 469.

[42] McElwain v. Corning, 12 Abb. Pr. 16.

[43] Ahner v. New York, N. H. & H. R. Co., 39 State Rep. 196, 20 Civ. Proc. R. (Browne) 318, 14 N. Y. Supp. 365.

The burden of proving, on a motion to set aside the service of summons on a corporation, that the person served was not a "managing agent" is on the corporation.[44] Such service will not, however, be sustained in the absence of proof as to what the relation of the person served actually is to the corporation.[45]

If the wrong person is served with summons he may move to set aside the service[46] though he is not bound to seek relief by motion but may serve an answer denying any liability on his part.[47] The most direct remedy is for him to appear in a form of appearance indicating that the summons has been served on the wrong individual, and, if no attention is paid to this, to formally answer after the complaint is received and to notice the case for trial, since if the defendant moves at once to set aside the service, he takes the risk of plaintiff insisting that the service was made on the right person, though the name was incorrectly stated in the summons in which case the motion must be denied.[48] But if he takes no steps, a judgment entered against him by default is of no effect.[49]

If service is procured by fraud or collusion and a motion is based thereon, the order should merely set aside service of summons and should not set aside the summons[50] or dismiss the action.[51]

—— **Waiver of objections.** Irregularities in the service of a summons can only be waived prior to the entry of a judgment, either by appearance in person or by attorney, or by the service of an answer or demurrer.[52] They cannot be waived after

[44] Donadi v. New York State Mut. Ins. Co., 2 E. D. Smith, 519; Persons v. Buffalo City Mills, 29 App. Div. 45.

[45] Coler v. Pittsburgh Bridge Co., 146 N. Y. 281.

[46] Smith v. Jackson, 20 Abb. N. C. 422.

[47] Barney v. Northern Pac. R. Co., 56 How. Pr. 23.

[48] Lederer Amusement Co. v. Pollard, 71 App. Div. 35, 10 Ann. Cas. 481. Compare Steinhaus v. Enterprise Vending Mach. Co., 81 N. Y. Supp. 282.

[49] Schoellkopf v. Ohmeis, 11 Misc. 253.

[50] Metcalf v. Clark, 41 Barb. 45.

[51] Beacom v. Rogers, 79 Hun, 220, 61 State Rep. 364.

[52] Mehrbach v. Partridge, 9 Misc. 209.

judgment, where defendant does not appear in the action.[53] A general appearance waives defects in the service of summons.[54]

—— Amendments. As already stated, the court may, in the exercise of its discretionary powers, permit the return to be amended, and this rule applies to affidavits or admissions of service; but it is obvious that no amendment can be properly allowed to confer jurisdiction, as in case of a void service, or where it would work a great injustice to the defendant, or affect the rights of third persons. In other words, it should be allowed only where the defect does not amount to more than a mere irregularity or mistake, when the summons was actually and properly served, and when no one will be thereby injured.

—— Form of affidavit on motion to set aside service on corporate officer.

That said ——— Company of California is a foreign corporation, duly organized under the laws of the state of California, and having its office and place of business in the state of New York, except a branch office for the transfer of its stock, and to receive assessments to be transmitted to California.

Deponent further says that, from his acquaintance with the business, property and effects of said ——— Company of California, said company, to the best of deponent's knowledge, information and belief, had not on the ——— day of ———, the day upon which said summons was served upon this deponent, and has not since had, and has not now, any property within the state of New York.

That at the time of the service of said summons on deponent said company had and still has a president, secretary and treasurer, all of whom then resided, and still reside in California, and were not within the state of New York, and deponent was not at the time of the service of said summons, and is not now the president, secretary or treasurer of said company, or any officer of said company, and does not and never did perform functions corresponding to either of said offices, and had and has nothing to do with the general business or affairs of the company, or with the books or papers in which its transactions are recorded, deponent having been at the time of such service, and still being, merely employed to take charge of the branch transfer office in this city, and to supervise the transfer of stock and the re-

[53] Mehrbach v. Partridge, 60 State Rep. 841, 9 Misc. 209.

[54] See post, § 779; Thistle v. Thistle, 5 Civ. Proc. R. (Browne) 43, 66 How. Pr. 472.

ceipt and transmission to California of assessments paid here, as deponent is directed by the officers of said company.

Deponent further says that when said summons was served upon him he was neither cashier, a director, nor managing agent of said corporation within this state, and had and has no power or right to act or answer for the said company in any respect, and that he is advised and believes that this action has not been commenced against the company, and that this court has not acquired jurisdiction in the premises.

That at the time of such service deponent informed the person making such service that he had no authority to accept service of said summons for the company; that the office of the company was at San Francisco, and that the office in New York was an office simply for transferring stock; that the person serving said summons stated that he was instructed to leave the summons.[55]

[55] Reddington v. Mariposa Land & Mining Co., 19 Hun, 405.

CHAPTER VII.

APPEARANCE.

§ 768. Nature of proceeding.

An appearance is a coming into court as party to a suit.[1] It is a voluntary act by which a court obtains jurisdiction of the person, as distinguished from obtaining jurisdiction of the person by means of process, i. e. compulsory. Appearance

[1] Cyc. Law Dict. 57.

is predicable of every party to an action who submits himself to the jurisdiction of the court, whether plaintiff or defendant. The plaintiff enters an appearance by commencing his action and serving the summons on defendant, while defendant enters his appearance by voluntarily submitting himself to the jurisdiction of the court after the action is commenced.[2] The entry of appearance is usually defendant's first step in the proceedings. The appearance of "plaintiff" in an action is complete when a summons in proper form, signed by himself or his attorney, has been served on the defendant.[3]

An appearance at common law could be of the following kinds:

(1) Compulsory.
(2) Voluntary.
(3) General. A simple and absolute submission to the jurisdiction of the court.
(4) Special. That which is made for certain purposes only, and does not extend to all the purposes of the suit.
(5) Conditional. One which is coupled with conditions as to its becoming general.
(6) De bene esse. One which is to remain an appearance, except in a certain event.
(7) Gratis. One made before the party has been legally notified to appear.
(8) Optional. One made where the party is not under any obligation to appear, but does so to save his rights. It occurs in chancery practice, especially in England.
(9) Subsequent. An appearance by the defendant after one has already been entered for him by the plaintiff.[4, 5]

[2] Davis v. Jones, 8 Civ. Proc. R. (Browne) 43.
[3] Davis v. Jones, 8 Civ. Proc. R. (Browne) 43.
[4, 5] Cyc. Law Dict. 57.

§ 769. Right to appear.

A person not named in the summons but who is served therewith by mistake, has no right to appear and defend on the merits.[6]

—— **Before service of process.** The right of a defendant to appear does not depend on his being served with process. The rule is that if his rights may be injuriously affected by the proceedings he may appear, though not served with process.[7] Thus the rights of a defendant may be injuriously affected by the proceeding where his goods have been taken on a writ of replevin,[8] or where a lis pendens has been filed against defendant's real estate,[9] or where defendant has been arrested on a ne exeat,[10] or where an injunction has been granted against him.[11]

One of two joint defendants who has not been served, may appear the same as if he had been duly served with process.[12] It seems that this rule does not apply, however, to an action or special proceeding against two or more executors or administrators, representing the same decedent, since the Code provides in such case, that those first served with process must answer, and that separate answers by different executors or administrators cannot be required or allowed, except by direction of the court.[13]

§ 770. Time to appear.

The general rule is that a defendant in an action may appear at any time before judgment, or at any time thereafter,

[6] Smith v. Jackson, 20 Abb. N. C. 422; Abeel v. Conhyser, 42 How. Pr. 252.

[7] Pearl v. Robitschek, 2 Daly, 50; McLoughlin v. Bieber, 26 Misc. 143; Tracy v. Reynolds, 7 How. Pr. 327.

[8] Clinton v. King, 3 How. Pr. 55.

[9] Duer v. Fox, 27 Misc. 676.

[10] Georgia Lumber Co. v. Bissell, 9 Paige, 225.

[11] Waffle v. Vanderheyden, 8 Paige, 45.

[12] Wellington v. Claason, 9 Abb. Pr. 175; Fox v. Brooks, 7 Misc. 426; Pearl v. Robitschek, 2 Daly, 50.

[13] Code Civ. Proc. § 1817; Salters v. Pruyn, 15 Abb. Pr. 224.

so long as there is any proceeding in which such defendant has any rights or interest to protect.[14] By delaying to enter an appearance, however, defendant may lose some rights as it has been held that failure to appear before the expiration of the time for answering precludes the necessity of giving notice to defendant of the assessment of damages.[15] On the other hand, an appearance served after the time to answer has expired and before judgment has been entered, is sufficient to entitle defendant to thereafter obtain an order for security for costs,[16] or to petition for a removal of the cause to another court.[17] It was formerly held that an extension of the time to appear cannot be granted.[18] Service of notice of appearance with answer, out of time, may be waived by plaintiff's acceptance and availing himself thereof.[19]

§ 771. Who may enter appearance.

Formerly an appearance, either of a plaintiff or of a defendant, was made in propria persona[20] but now the practice is to appear by an attorney at law. The question of appearance by particular persons such as infants, insane persons, husband and wife, partners, etc., will be treated of in chapters relating to actions by, against or between, such persons. Questions relating to the authority of an attorney to appear, presumptions, etc., have been considered in the chapter relating to attorneys.

§ 772. What constitutes an appearance.

The question of what constitutes a general appearance in an action so as to preclude the raising of jurisdictional questions, has often come before the courts and is of much im-

[14] Martine v. Lowenstein, 68 N. Y. 456.

[15] Pearl v. Robitschek, 2 Daly, 50.

[16] Abbott v. Smith, 8 How. Pr. 463.

[17] Carpenter v. New York & N. H. R. Co., 11 How. Pr. 481.

[18] Bragelman v. Berding, 15 Abb. Pr., N. S., 22. But Littauer v. Stein, 85 N. Y. Supp. 71, holds that extending the time to answer extends the time to appear.

[19] Lynch v. Andrews, 28 Super. Ct. (5 Rob.) 611.

[20] 3 Bl. Comm. 25.

portance. In the early days, an appearance could be made in only three ways viz; by putting in special bail, by putting in common bail, or by expressly causing an appearance to be entered.[21] It was then held that a notice of retainer was not an appearance in the cause[22] but thereafter it was provided by a rule of court that service of a notice of appearance, or of retainer generally, should in all cases be deemed an appearance except where special bail should be required.[23] The Code provides that the appearance of a defendant must be made by serving on the plaintiff's attorney, within twenty days after service of the summons, a notice of appearance, or a copy of a demurrer or of an answer. A notice or pleading, so served, must be subscribed by defendant's attorney who must add his office address which must include, if in a city, the street and street number.[24]

First, a voluntary appearance, to be effectual, must be with knowledge that there is a suit pending and with an intention to appear therein.[25] Second, defendant's appearance must be made either "by serving on the plaintiff's attorney, within twenty days after service of the summons, exclusive of the day of service, a notice of appearance, or a copy of a demurrer or of an answer."[26] The question then arises "Is this provision exclusive." The tendency of the decisions since the Code of Civil Procedure is to the effect that a general appearance can be entered in no other way,[27] though the old rule, which has not been entirely discarded, was that obtaining and serving an order for extending time to answer, or giving notice of motion, was a general appearance so as to confer juris-

[21] Mann v. Carley, 4 Cow. 148.
[22] Mann v. Carley, 4 Cow. 148.
[23] Dole v. Manley, 11 How. Pr. 138.
[24] Code Civ. Proc. § 421.
[25] Merkee v. City of Rochester, 13 Hun, 157.
[26] Code Civ. Proc. § 421.
[27] Couch v. Mulhane, 63 How. Pr. 79; Valentine v. Myers' Sanitary Depot, 36 Hun, 201; Wood v. Furtick, 17 Misc. 561; Bell v. Good, 46 State Rep. 572 which reversed decision (22 Civ. Proc. R. [Browne] 317) holding that obtaining extension of time to answer was a general appearance.

diction.[28] There are authorities, however, since the Code of Civil Procedure, holding the contrary in terms though not in spirit. The theory thereof is exemplified by a decision of the city court of New York[29] which holds that though section 421 of the Code prescribes a certain form in which defendant's attorney must add his signature to a notice of appearance, demurrer or answer, yet such statutory provision does not make void a paper served, though varying somewhat from the statutory form, and it was held that there is a sufficient notice of appearance where an attorney for a defendant, under oath, in his application for an order extending the time to answer, states that he is the attorney for the defendant, and he is so described in the affidavit of merits sworn to by defendant, and where the papers are indorsed by the attorney as attorney for the defendant and his office address is also indorsed in the usual manner, and such papers, so indorsed, are served on plaintiff's attorney within the required time. The court, in its opinion, suggests that the test as to whether there is an appearance, is whether the court acquires jurisdiction to do the act sought in the motion claimed to constitute the appearance. One difficulty in holding this Code provision to be exclusive, is that it only provides for an appearance within the time allowed for an answer, though it is well settled that an appearance may be first entered even after judgment. Thus the filing a petition to open a decree obtained upon the petitioner's default is an appearance which cures the defect of service of the process in the action made outside the state.[30] The mere personal presence of a defendant in the court room during the trial does not of itself constitute an appearance,[31] nor does a cross-examination of wit-

[28] Baxter v. Arnold, 6 Abb. Pr. 340, note, 9 How. Pr. 445; Dole v. Manley, 11 How. Pr. 138; Ayres v. Western R. Corp., 48 Barb. 132; Phelps v. Phelps, 6 Civ. Proc. R. (Browne) 117.

[29] Krause v. Averill, 4 Civ. Proc. R. (Browne) 410.

[30] Johnson v. Johnson, 67 How. Pr. 144.

[31] Tiffany v. Gilbert, 4 Barb. 320; Merkee v. City of Rochester, 13 Hun, 157. So the mere entering the court room, and, without offering to answer, simply showing to the magistrate a physician's certificate that the wife of the party was sick, and thereupon leaving the

nesses by a person unauthorized,[32] nor does service of motion papers by a defendant seeking to have a lis pendens canceled for want of service of the summons on the defendant,[33] nor does the obtaining an extension of time to answer, either by stipulation by the plaintiff's attorney or by an order from the judge,[34] nor a notice of a motion to make the complaint more definite and certain.[35] An interesting question decided in the negative by the court of appeals has lately arisen as to whether the writing of a verified letter by defendant to plaintiff's attorney, referring to the matters contained in the complaint, constitutes an appearance.[36]

The court of appeals and the federal circuit courts hold directly opposite on the question whether the filing of a petition for the removal of a cause from a state to the federal court, is a general appearance by defendant. The court of appeals holds that such an act constitutes a general appearance precluding a subsequent motion to set aside the service of process,[37] while the federal courts hold the contrary.[38]

Inasmuch as the rule is not well established, it is the safer practice to strictly follow the Code rule by either serving a formal notice of appearance or by serving a demurrer or answer.[39]

—— **By plaintiff.** A plaintiff appears by bringing his action and serving summons on defendant.[40]

—— **Sufficiency for some purposes.** An appearance may be sufficient for some purposes while insufficient for others. Thus

room, is not an appearance which could give jurisdiction.—Luhrs v. Commoss, 13 Abb. N. C. 88.

32 Campbell v. Lumley, 24 Misc. 196.

33 Cohen v. Levy, 27 Misc. 330.

34 Benedict v. Arnoux, 74 State Rep. 776; Paine Lumber Co. v. Galbraith, 38 App. Div. 68; Bell v. Good, 22 Civ. Proc. R. (Browne) 356. Contra,—Kneeland v. Martin, 2 Month. Law Bul. 56; Quin v. Tilton, 9 Super. Ct. (2 Duer) 648; Goldstein v. Goldsmith, 28 Misc. 569.

35 Valentine v. Myers' Sanitary Depot, 36 Hun, 201.

36 Matter of Kimball, 155 N. Y. 62.

37 Farmer v. National Life Ass'n, 138 N. Y. 265.

38 Farmer v. National Life Ass'n, 28 Abb. N. C. 421.

39 Couch v. Mulhane, 63 How. Pr. 79.

40 Davis v. Jones, 8 Civ. Proc. R. (Browne) 43.

signature of motion papers, though it may be a sufficient appearance to waive irregularities, is not sufficient to entitle a defendant to notice of further proceedings, such as application for judgment.[41]

—— Form of general appearance.

[Title and venue.]

Please take notice that I am retained by and appear as attorney for the defendant (or defendants, if more than one, and, if retainer is for a particular defendant, so specify) in the above entitled action, and demand a copy of the complaint therein.

[Date.] [Name of attorney and his office and postoffice address.]

To ———, attorney for plaintiff.

§ 773. Subscription of notice of appearance.

Writing address of attorney on back of folded answer, is sufficient though not added to attorney's name subscribed to notice of appearance which was immediately beneath.[42]

§ 774. Effect of indorsements on notice of appearance.

An indorsement on a notice of appearance of the date of its receipt forms no part of the essence of the paper, and hence the fact that it bears a date prior to the date of the summons, does not invalidate it.[43]

§ 775. Entry of appearance where default is intended.

It is sometimes advisable for a defendant to enter an appearance though it is his intention not to fight the case. On the one hand, there is a waiver of jurisdiction of defendant's person, while on the other hand such act entitles defendant to notice of all subsequent proceedings had therein, which in any respect affect his rights and interests,[44] and if he makes default in pleading, he is entitled to five days' notice of the time and place of an assessment by the clerk, and to eight

[41] Douglas v. Haberstro, 8 Abb. N. C. 230.

[42] German American Bank v. Champlin, 11 Civ. Proc. R. (Browne) 452.

[43] Steinam v. Strauss, 63 Hun, 629, 18 N. Y. Supp. 48, 44 State Rep. 380.

[44] Lochte v. Moeschler, 12 State Rep. 763; Wells v. Cruger, 5 Paige 164.

days' notice of the time and place of an application to the court for judgment.[45] If defendant appears, plaintiff may, in a proper case, take judgment by default without application to the court.[46]

§ 776. Entry of appearance as part of record.

Rule 9 of the General Rules of Practice provides that at any time after an appearance the plaintiff may have the same entered in the proper book kept by the clerk, on filing an affidavit of such appearance, stating when, how, and by whom made.

§ 777. Special appearance.

A special appearance is one made to object to the court's jurisdiction. It seems that a special appearance is limited to an appearance to raise objections to jurisdiction of the person as distinguished from the subject matter. The objection of want of jurisdiction of the subject matter is not waived by failure to urge it but may be raised at any stage of the proceedings, and hence there is no necessity that the appearance to object thereto should be special. A party may appear specially to raise the objection that he was not served with process at all, or that the process served was illegal or defective, or that he was not served within the jurisdiction. Thus the service of an answer by the attorney of a non-resident, pleading want of jurisdiction, is a special appearance,[47] as is defendant's demand, served on plaintiff's attorney before application for judgment by default, of notice of the execution of any reference or writ of inquiry which may be granted on the application,[48] or a general notice of appearance, served after judgment and with the papers on which a motion to set aside the judgment is made, which does not waive the irregularity of serving summons on election day, it being treated as a notice only for

[45] Code Civ. Proc. § 1219.

[46] Code Civ. Proc. § 419.

[47] Hamburger v. Baker, 35 Hun, 455; Belden v. Wilkinson, 33 Misc. 659.

[48] Code Civ. Proc. § 1219; Arkenburgh v. Arkenburgh, 14 App. Div. 367. Such a special appearance entitles defendant to notice generally of the proceedings in the action other than the notice demanded.

the purposes of the motion.[49] A special appearance may be made by motion or answer.

—— **General or special appearance.** The question often arises as to whether an appearance is general or special. As a special appearance is one to question the jurisdiction of the court, all other appearances are general. Thus where a notice of motion and affidavits show that the sole purpose of the motion relates to jurisdiction such as a motion to set aside service of the summons, the notice is not a general appearance, but a special appearance, although the attorney's signature is not qualified by the addition of "attorney for the purpose of this motion only."[50] On the other hand, an appearance is general rather than special though the attorney appears and questions the jurisdiction of the court, where he does not limit his appearance to such question but also litigates the issue on the merits.[51] The rule is that a defendant cannot, on an alleged special appearance, obtain all the advantages of contesting the cause of action which would follow from a general appearance and yet avoid the disadvantages resulting from such appearance. This rule is applied by holding that a non-resident defendant cannot specially appear after attachment and service by publication to contest his liability and to claim that the court had no jurisdiction in excess of the value of the property attached.[52] A general appearance cannot be converted into a special appearance by the mere declaration of the attorney that the appearance is special. In other words, if defendant submits himself to the jurisdiction of the court, no disclaimer which he may make on the record, that he does not intend to do so, will be effectual to defeat the consequences of his act.[53] The defendant cannot couple with a voluntary appearance a reservation of an objection to jurisdiction, on personal grounds.[54]

[49] Bierce v. Smith, 2 Abb. Pr. 411.

[50] Noble v. Crandall, 49 Hun, 474, 15 Civ. Proc. R. (Browne) 265; Lake v. Kels, 11 Abb. Pr., N. S., 37.

[51] Lynde v. Lynde, 41 App. Div. 280; Grant v. Birrell, 35 Misc. 768.

[52] Swift v. Tross, 55 How. Pr. 255. See, also, Matter of MacAulay, 27 Hun, 577.

[53] Farmer v. National Life Ass'n, 138 N. Y. 265; Ballard v. Burrowes, 25 Super. Ct. (2 Rob.) 206.

[54] Mahaney v. Penman, 1 Abb. Pr. 34; Reed v. Chilson, 142 N. Y. 152.

——**Effect.** A special appearance is not a waiver of the defect objected to[55] or of defects in the proceedings preliminary to such appearance.[56] Thus a special appearance for the purpose of moving to vacate an attachment will not validate the attachment.[57] In other words, an appearance merely to contest or question the jurisdiction of the court is not an appearance which confers jurisdiction.[58] There is one line of New York cases which hold that the fact that a defendant appears and files an answer, and takes part in the trial after his objection to the jurisdiction of the court has been overruled, is not a sufficient appearance on the part of defendant to waive his objections to the jurisdiction previously taken,[59] especially where the objection raised on the special appearance is again urged at the close of the evidence,[60] but if defendant, in an action in another state, appears to contest jurisdiction, and, on his objection being overruled, answers, and by the law of such state, the answer is a submission to jurisdiction, it will be so considered in this state.[61] The latest decision of the court of appeals, however, holds the contrary. It is there said, in answer to the contention that defendants were obliged to appear and present the facts to the court or suffer default, after the objection to the jurisdiction was overruled, so that the appearance

[55] Malcom v. Rogers, 1 Cow. 1; Cunningham v. Goelet, 4 Denio, 71; Seymour v. Judd, 2 N. Y. (2 Comst.) 464.

[56] Cunningham v. Goelet, 4 Denio, 71; People ex rel. Wyman v. Johnson, 1 Thomp. & C. 578.

[57] Union Distilling Co. v. Ruser, 61 Hun, 625, 16 N. Y. Supp. 50; Tiffany v. Lord, 65 N. Y. 310.

[58] Wheeler v. Lampman, 14 Johns. 481 (objection to sufficiency of return of process); Sullivan v. Frazee, 27 Super. Ct. (4 Rob.) 616 (objection that summons was served in another state); Brett v. Brown, 13 Abb. Pr., N. S., 295 (objection that summons was served in violation of privilege); Ogdensburgh & C. R. Co. v. Vermont & C. R. Co., 16 Abb. Pr., N. S., 249; Hamburger v. Baker, 35 Hun, 455; Hankinson v. Page, 19 Abb. N. C. 274; Heenan v. New York, W. S. & B. Ry. Co., 34 Hun, 602; Von Hesse v. Mackaye, 55 Hun, 365.

[59] Everett v. Everett, 22 App. Div. 473; Boynton v. Keeseville Electric Light & Power Co., 5 Misc. 118; Lazzarone v. Oishei, 2 Misc. 200.

[60] McDonald v. McLaury, 43 State Rep. 512.

[61] Jones v. Jones, 108 N. Y. 415. Decision in supreme court, 36 Hun, 414.

was not voluntary, that "when a party does not intend to subject himself to the jurisdiction of the court he must appear specially for the purpose of raising the question of jurisdiction by motion, or he may allow the plaintiff to go on and take judgment by default without affecting his rights, since no judgment entered without service of process in some form could bind the defendant, and the question of jurisdiction would protect him at any stage of the proceedings for its enforcement, provided it has not been waived by his own act."[62]

—— Form of special appearance.

[Title and venue.]

Please take notice that I appear specially for the defendant, X, in the above action, and for the sole purpose of moving to set aside the service of the summons therein upon him, alleged to have been made, as shown by the return of service on file in said action.

——————,
Attorney for Defendant.

[Date.] [Office and postoffice address.]

§ 778. Waiver of notice of appearance.

Notice of appearance given by defendant's attorneys may be waived by them. Thus where a defendant who had been served with summons appeared by attorneys, who demanded service of the complaint, but their notice of appearance was returned on the ground that another attorney who had acted in some respects for defendant had already appeared, whereupon the other attorneys procured a consent and order of substitution which was served on plaintiff's attorney, but no subsequent demand for a complaint was made, it was held that the conduct of the attorneys was such as to waive their notice of appearance and demand for complaint, and that the plaintiff was justified in treating the defendant as in default and entering judgment thereon.[63]

§ 779. Effect of general appearance.

The most important phase of the question of a general ap-

[62] Reed v. Chilson, 142 N. Y. 152. Followed by Woodruff v. Austin, 16 Misc. 544.

[63] New Haven Web Co. v. Ferris, 115 N. Y. 641.

pearance is its effect which may be reduced to a number of well settled rules as follows:

Rule 1. A voluntary general appearance of the defendant is equivalent to personal service of the summons on him.[64] In other words, the effect of a voluntary appearance without service of process is to confer on defendant the same right as though served, and to give plaintiff the same right as though he had duly served defendant with process. Thus an appearance in attachment proceedings against a nonresident, confers jurisdiction of the person.[65] So an appearance by a defendant, where service of the summons by publication had been ordered, before completion of the publication, warrants a suspension of the publication and entry of judgment by consent before the expiration of the time for publication.[66] And an appearance by a foreign corporation, as defendants in an action, subjects them to the courts' jurisdiction, as if they were a corporation under laws of this state.[67] Furthermore, a person who voluntarily appears is bound by a judgment though not named as a party to the action.[68]

Subordinate rule 1. An appearance cures the failure to serve process.[69] However, it does not dispense with proof of service of process necessary to sustain a judgment by default.[70]

Subordinate rule 2. An appearance waives objections to defects in process.[71] Illustrations of such defects which are cured are an omission to specify the court,[72] or failure to adapt the

[64] Code Civ. Proc. § 424; Attorney General v. Guardian Mut. Life Ins. Co., 77 N. Y. 272; Christal v. Kelly, 88 N. Y. 285; Reed v. Chilson, 142 N. Y. 152; Woodruff v. Austin, 16 Misc. 544, 74 State Rep. 138.

[65] Noyes v. Butler, 6 Barb. 613; Olcott v. Maclean, 73 N. Y. 223.

[66] Tuller v. Beck, 108 N. Y. 355.

[67] Dart v. Farmers' Bank at Bridgeport, 27 Barb. 337; De Bemer v. Drew, 57 Barb. 438; Brooks v. New York & G. L. R. Co., 30 Hun, 47.

[68] People v. Hydrostatic Paper Co., 88 N. Y. 623.

[69] Schmalholz v. Polhaus, 49 How. Pr. 59; Hutton v. Murphy, 9 Misc. 151, 59 State Rep. 662; Washbon v. Cope, 144 N. Y. 287.

[70] Macomber v. City of New York, 17 Abb. Pr. 35.

[71] The rule applies to corporations. Murray v. Vanderbilt, 39 Barb. 140; Le Sage v. Great Western Ry. Co., 1 Daly, 306.

[72] Legate v. Lagrille, 1 How. Pr. 15; Dix v. Palmer, 5 How. Pr. 233.

summons to the cause of action,[73] or failure to state the nature of the cause of action,[74] or omission to indorse upon the summons a reference to the statute under which the action is brought,[75] or the making a writ returnable on Sunday,[76] or an error in the notice to plead as to the time given to plead,[77] or making a copy of the summons returnable at an earlier day than the original,[78] or the failure of a copy of the summons to show that the original was stamped.[79] The fact that defendant is ignorant of the irregularity makes no difference.[80] On the other hand, an appearance does not waive a variance between the summons and the complaint.[81]

Exception 1. Appearance is not a waiver of defects in jurisdiction, where the statute declares that such defects shall render the judgment void.[82] Thus it has been held that a service in ejectment on defendant's wife, and not on the premises, is not cured by an appearance.[83]

Exception 2. There is an exception to the rule in the case of a guardian ad litem. As he cannot be appointed until after a valid service of summons, his appearance does not cure defects in the service.[84]

[73] Day v. Wilber, Col. & C. Cas. 381; Webb v. Mott, 6 How. Pr. 439; Hewitt v. Howell, 8 How. Pr. 346.

[74] Heilner v. Barras, 3 Code R. 17; Hogan v. Baker, 2 E. D. Smith, 22; Bray v. Andreas, 1 E. D. Smith, 387; Cushingham v. Phillips, 1 E. D. Smith, 416.

[75] Mulkins v. Clark, 3 How. Pr. 27; Sprague v. Irwin, 27 How. Pr. 51; Vernon v. Palmer, 48 Super. Ct. (16 J. & S.) 231; Townsend v. Hopkins, 9 Civ. Proc. R. (Browne) 257.

[76] Wright v. Jeffrey, 5 Cow. 15.

[77] Gardner v. Teller, 2 How. Pr. 241.

[78] Nemetty v. Naylor, 100 N. Y. 562.

[79] Watson v. Morton, 27 How. Pr. 294.

[80] Mulkins v. Clark, 3 How. Pr. 27; Sprague v. Irwin, 27 How. Pr. 51; Wright v. Jeffrey, 5 Cow. 15; Pixley v. Winchell, 7 Cow. 366.

[81] Voorhies v. Scofield, 7 How. Pr. 51; Bierce v. Smith, 2 Abb. Pr. 411; Tuttle v. Smith, 6 Abb. Pr. 329, 14 How. Pr. 398; Shafer v. Humphrey, 15 How. Pr. 564.

[82] Snyder v. Goodrich, 2 E. D. Smith, 84; Beattie v. Larkin, 2 E. D. Smith, 244.

[83] Kellogg v. Kellogg, 2 How. Pr. 100.

[84] Ingersoll v. Mangam, 84 N. Y. 622; Bingham v. Bingham, 3 How. Pr., N. S., 166.

Subordinate rule 3. All objections to the irregularity or sufficiency of service are waived by appearance.[85] So a witness served with process in an action in violation of his privilege waives the objection by voluntarily appearing in the action.[86] There is, however, an exception to this rule in that irregularities in the service of a summons can only be waived by appearance "prior to the entry of a judgment."[87]

Rule 2. Appearance does not give jurisdiction of the subject-matter.[88] Appearance does not give jurisdiction of a cause of action arising out of the state in favor of a nonresident against a foreign corporation,[89] but it has been held that an unqualified appearance does give such jurisdiction.[90]

Rule 3. Certain irregularities other than those relating to process are waived by a general appearance. Thus a general appearance waives the alleging additional facts by amended complaint rather than by supplemental complaint,[91] or that a petition for condemnation of lands was not properly verified,[92] or the fact that the action was commenced without leave,[93] or that the Christian names of plaintiffs do not appear.[94] On the other hand, an appearance does not waive ir-

[85] Ogdensburgh & L. C. R. Co. v. Vermont & C. R. Co., 63 N. Y. 176; Mack v. American Exp. Co., 20 Misc. 215; Cochran v. Reich, 20 Misc. 593.

[86] Woodruff v. Austin, 16 Misc. 543; Stewart v. Howard, 15 Barb. 26; Chadwick v. Chase, 5 Wkly. Dig. 589.

[87] Mehrbach v. Partridge, 9 Misc. 209.

[88] Sackett v. Newton, 10 How. Pr. 560; People ex rel. Debenetti v. Clerk of Marine Court, 3 Abb. Pr. 309, 13 How. Pr. 260; Grocers' Nat. Bank v. Clark, 31 How. Pr. 115; Wheelock v. Lee, 74 N. Y. 495; Davidsburgh v. Knickerbocker Life Ins. Co., 90 N. Y. 526; Newhall v. Appleton, 46 Super. Ct. (14 J. & S.) 6; McCarty v. Parker, 26 Abb. N. C. 235; Dreyfus v. Carroll, 28 Misc. 222; Wands v. Robarge, 24 Misc. 273.

[89] Brooks v. Mexican Nat. Const. Co., 50 Super. Ct. (18 J. & S.) 281; Parkhurst v. Rochester Lasting Mach. Co., 65 Hun, 489; Galt v. Provident Sav. Bank, 18 Abb. N. C. 431; Ervin v. Oregon Ry. & Nav. Co., 28 Hun, 269, 62 How. Pr. 490.

[90] Carpentier v. Minturn, 65 Barb. 293.

[91] Beck v. Stephani, 9 How. Pr. 193.

[92] Matter of New York, L. & W. R. Co., 33 Hun, 148.

[93] Hubbell v. Dana, 9 How. Pr. 424.

[94] Ballouhey v. Cadot, 3 Abb. Pr., N. S., 122.

regularities in ancillary proceedings. Thus a general appearance, in response to a summons, does not waive defects in replevin proceedings taken in the action, though it seems the rule would be otherwise if the action was commenced by writ of replevin, as under the old practice.[95] So an appearance will not validate an attachment otherwise void.[96]

§ 780. Effect of unauthorized appearance by attorney.

The effect of an unauthorized appearance by an attorney, on the validity of the judgment, will be fully considered in the chapter relating to judgments. Suffice it to say at this time that the general rule is that such a judgment may be set aside on direct application but is not subject to collateral attack.[97]

§ 781. Effect of failure to appear.

It is well settled that when a party does not appear he waives nothing, but this statement means merely that he waives nothing impeaching the jurisdiction or authority of the court to act, and nothing in the way of objection to the proceedings and the competency or sufficiency of evidence on the part of the plaintiff.[98] On the other hand, if summons has been served, failure to appear warrants a judgment by default, without notice to defendant of the various proceedings.

§ 782. Striking out appearance.

An unauthorized appearance may be stricken out on motion, but not where the appearance by attorney does the party no injury because he has no interest in the litigation.[99]

§ 783. Withdrawal of appearance.

A notice of appearance which has been served cannot be

[95] McAdam v. Walbrau, 8 Civ. Proc. R. (Browne) 451.

[96] Granger v. Schwartz, 11 N. Y. Leg. Obs. 346.

[97] For note on effect of, and remedies for, unauthorized appearance of attorney, see 8 Ann. Cas. 315.

[98] Clark v. Van Vrancken, 20 Barb. 278; Larocque v. Harvey, 57 Hun, 366.

[99] Brower v. Kahn, 76 Hun, 68, 59 State Rep. 629.

withdrawn without leave of court,[100] which will be granted where attorneys appear under a misapprehension as to their authority[101] or under the mistaken belief that summons had been personally served on defendant,[102] but not on the attorney's application based on the ground that he was not authorized to appear, where the defendant acquiesces.[103]

[100] Galt v. Provident Sav. Bank, 18 Abb. N. C. 431.
[101] Dillingham v. Barron, 6 Misc. 600.
[102] Hunt v. Brennan, 1 Hun, 213.
[103] Mallet v. Girard, 3 Edw. Ch. 372.

PART IV.

PLEADING.

CHAPTER I.

GENERAL RULES RELATING TO PLEADINGS.

ART. I. INTRODUCTORY.

§ 784. Definition of pleadings.

Pleadings are defined by Blaekstone to be "the mutual allegations between plaintiff and defendant, which at present are

set down and delivered into the proper office, in writing, though formerly they were usually put in by counsel ore tenus or viva voce in court, and there minuted down by the chief clerk or prothonotary."[1] Chitty defines them as "the statement in a logical and legal form of the facts which constitute the plaintiff's cause of action, or the defendant's ground of defense; it is the formal mode of alleging that upon the record, which would be the support of the action or the defense of the party in evidence."[2]

§ 785. Common law, equity and Code pleading—Scope of chapter.

Prior to the adoption of the Codes in this state, the two systems of pleading in use were the common law and the equity systems. The Code of Procedure abolished all forms of pleadings theretofore existing and provided that the forms of pleading in civil actions should be only those prescribed therein.[3] The Code of Civil Procedure, while not retaining the precise phraseology, substantially preserved the rule by providing that the forms of pleading in an action are to be governed by the Code chapter relating to pleadings, except where express provision is made to the contrary.[4] While all "forms" of pleading are abolished,[5] yet the rules of law which determine the validity of the cause of action or defense as set forth in the pleading remain the same, and those rules of common law pleading which rest on principles of logical statements, and, without regard to form, tend to produce materiality and certainty of issue, and to prevent obscurity, confusion or prolixity, are either practically reproduced by express provisions in the Code or are held by the courts to inhere in the new Code system.[6] And notwithstanding this change in the form of

[1] 3 Bl. Comm. 393.
[2] 1 Chit. Pl. 235.
[3] Code Pro. § 140.
[4] Code Civ. Proc. § 518.
[5] Phillips v. Gorham, 17 N. Y. 270.
[6] The principles of pleading, whatever the system, are always the

pleadings it was held at an early day[7] that the use of the common counts in a complaint was good and such decision has been followed in recent cases.[8] The principal changes effected by the Code in relation to the rules of common law pleading, were the abolition of mere forms, fictions and falsehoods; the requirement that facts must be stated; the authorizing to a larger extent the joinder of causes of action and defenses; the enactment of a more liberal rule in reference to construction of pleadings; and more adequate and comprehensive rules for verification of pleadings.[9]

Further than these most general statements, it is not within the scope of this work to review the common law and equity systems of pleading and to show wherein they differ from each other and wherein the Code systems differ from either or both of such systems, or to consider the question as to how far the courts have carried out the intentions of the framers of the Code. This chapter is intended to cover the Code provisions relating to pleadings and to show how such provisions have been applied in this state. Rules relating to pleadings in particular actions or proceedings will be considered in subsequent chapters relating to such actions or proceedings.

ART. II. FORM OF PLEADINGS AND PARTS THEREOF.

§ 786. Abbreviations, numbers, folios, endorsements, etc.

Every pleading must be in the English language, made out

same. Buddington v. Davis, 6 How. Pr. 401; Boyce v. Brown, 7 Barb. 80; Fry v. Bennett, 7 Super. Ct. (5 Sandf.) 68; New York Security & Trust Co. v. Saratoga Gas & Electric Light Co., 88 Hun, 569.

[7] Allen v. Patterson, 7 N. Y. (3 Seld.) 476.

[8] Doherty v. Shields, 86 Hun, 303, 307, which cites cases holding same rule.

[9] Ensign v. Sherman, 14 How. Pr. 439; Bush v. Prosser, 11 N. Y. (1 Kern) 347. For a concise statement of the principal changes effected by the Code, see, also, Bryant's Code Pl. pp. 101-105.

upon paper or parchment, in a fair legible character, in words at length and not abbreviated. But the proper and known names of process, and technical words, may be expressed in appropriate language, as now is and heretofore has been customary; such abbreviations as are now commonly employed in the English language may be used; and numbers may be expressed by Arabic figures, or Roman numerals, in the customary manner.[10] All pleadings and copies thereof must be fairly and legibly written or printed in black ink on durable paper. Every pleading exceeding two folios in length, must be distinctly numbered and marked at each folio, in the margin thereof, and all copies either for the parties or the court, shall be numbered or marked in the margin so as to conform to the original draft or entry and to each other, and shall be endorsed with the title of the cause. If not so written or printed and folioed and endorsed as aforesaid, the clerk shall not file the same, nor will the court hear any motion or application founded thereon. The remedy of the opposing party is to return the pleading within twenty-four hours, with a statement of the objection to it.[11] A carbon copy of a pleading is not sufficient.

§ 787. Parts of a pleading.

Every pleading must first contain the title of the cause which embraces, in addition to the names of the parties, the name of the court and of the county in which the action is triable. As to the mode of setting forth the names of the parties, reference should be made to a previous chapter.[12] Following the title comes the statement of the cause of action or defense in plain and concise language. Then comes the prayer for relief if the pleading is a complaint or counterclaim. Following this appears the signature of the attorney representing the party in whose behalf the pleading is presented. Then comes the verification, if desired or required, which is usually signed by the party.

Subscription of pleading. A pleading must be sub-

[10] Code Civ. Proc. § 22.
[11] Rule 19 of General Rules of Practice.
[12] See ante, § 703.

scribed by the attorney for the party.[13] And if the pleading constitutes the appearance of a defendant it must add the office address of the attorney which must contain, if in a city, the street and street number, if any, or suitable designation of the particular locality.[14] But the office address of the attorney need be added to his signature only where the pleading is the only notice of appearance in the action.[15] An indorsement of the attorney's name upon the outside of the paper is not sufficient as a "subscription,"[16] though it would seem that the attorney's signature to the verification, if proper, would be a sufficient subscription.[17] Failure to return the pleading waives the defect;[18] but if no amendment is made, judgment may be taken by default as soon as the time to answer has expired, even although such answer has not been returned at the time of entry of judgment, but is returned subsequently and within twenty-four hours after its service.[19]

ART. III. WHAT TO BE STATED.

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[13] Code Civ. Proc. § 520; Rule 2 of General Rules of Practice. If not so subscribed, it may be returned. Duval v. Busch, 21 Abb. N. C. 214, 14 Civ. Proc. R. (Browne) 6.

[14] Code Civ. Proc. § 417.

[15] German American Bank v. Champlin, 11 Civ. Proc. R. (Browne) 452; Feist v. City of New York, 15 App. Div. 495, 78 State Rep. 491. Contra, Allen v. Bagnell, 12 Civ. Proc. R. (Browne) 426, which is based on rule 2 of General Rules of Practice which provides that all papers served or filed must be indorsed or subscribed with the name and address of the attorneys.

[16] Schiller v. Maltbie, 11 Civ. Proc. R. (Browne) 304. This case further holds that there must be both a subscription and an endorsement of the attorney's name and relies on rule 2 of General Rules of Practice. Such rule now provides, however, that all papers served or filed must be indorsed "or" subscribed.

[17] Barrett v. Joslynn, 9 Misc. 407. So where defendant appears in person. Hubbell v. Livingston, 1 Code R. 63.

[18] Ehle v. Haller, 19 Super. Ct. (6 Bosw.) 661.

[19] Drucker v. McCallum, 21 Abb. N. C. 209.

Conclusions of law, § 792.
Facts of which courts take judicial notice, § 793.
Surplusage, irrelevancy, redundant and scandalous Matter, § 794.

§ 788. General considerations.

The pleadings should present the facts which the party intends to establish by proof, if controverted, and upon which he expects the law to be pronounced.[20] Allegations merely formal, i. e. such as require no proof at the trial, are unnecessary.[21] This is the Code rule. It is simple but not always easily applied. The word "facts" means actual occurrences.[22] The truth and not a fiction is to be pleaded. Falsity is not allowable in an answer. If a defense is so clearly false as not to present any substantial issue, it is sham and may be stricken out.[23] As will be more fully stated in a subsequent paragraph, pleadable facts and the evidence of facts are to be distinguished.[24]

It has been said that facts should be stated according to their legal effect.[25] By this is meant that the pleader is to state the inferences which the law draws from the facts themselves. But this rule does not apply in all cases. The rule laid down by the great majority of our cases is that facts "may" be pleaded according to their legal effect,[26] but that the legal effect need not be set forth in the pleading if the court can see from any point of view that the facts stated imply a legal obligation upon the defendant.[27] In other words, a pleader is not bound to state the theory of law on which his claim is based.[28] For instance, it is sufficient to state the facts from which the

20 Russell v. Clapp, 7 Barb. 482.

21 Ensign v. Sherman, 14 How. Pr. 439; Dias v. Short, 16 How. Pr. 322.

22 Lawrence v. Wright, 9 Super. Ct. (2 Duer) 673.

23 People v. McCumber, 18 N. Y. 315; Farnsworth v. Halstead, 18 Civ. Proc. R. (Browne) 227; Goodwin v. Thompson, 88 Hun, 598.

24 See post, § 789.

25 Boyce v. Brown, 7 Barb. 80.

26 Facts may be stated according to their legal effect only when, if they are so stated. the pleading remains substantially true.

27 Milliken v. Western Union Telegraph Co., 110 N. Y. 403.

28 Hemmingway v. Poucher, 98 N. Y. 281.

law infers a liability or implies a promise,[29] though it is undoubtedly good pleading to aver the liability or promise in connection with the facts. It is proper and customary, however, in pleading a writing, to set it out according to its legal effect. Thus, a by-law of a voluntary association may be set out in an answer according to its legal effect without reciting its exact language.[30] As to the complaint, the plaintiff may ordinarily state the facts constituting his cause of action, either as they actually existed or according to their legal effect, and if in adopting the latter course the defendant is not informed as to the proof which he may be required to meet at the trial, his remedy is by motion to make more definite and certain or for a bill of particulars.[31] Thus in pleading a contract made by an agent for the principal, it is sufficient to aver that the contract was made by the principal.[32] So a complaint may allege that two plaintiffs are co-partners and are the owners of a judgment, as against a demurrer.[33]

§ 789. Evidence.

It was a rule of common law pleading that a pleading must set forth, not the evidence of facts, but the facts themselves. This rule prevails under the Codes which require "the facts constituting the cause of action" to be stated.[34] In this respect a pleading differs from an affidavit which presents evidence to the court from which it may draw conclusions of fact.[35] The words "facts constituting a cause of action" mean the facts which the evidence on the trial will tend to prove and

[29] Jordan & Skaneateles Plankroad Co. v. Morley, 23 N. Y. 552.

[30] Kehlenbeck v. Logeman, 10 Daly, 447.

[31] New York News Pub. Co. v. National Steamship Co., 148 N. Y. 39; Brown v. Champlin, 66 N. Y. 214; Rochester Ry. Co. v. Robinson, 133 N. Y. 242; Thayer v. Gile, 42 Hun, 268; Tuttle v. Hannegan, 54 N. Y. 686.

[32] Moore v. McClure, 8 Hun, 557.

[33] McKee v. Jessup, 62 App. Div. 143.

[34] Pattison v. Taylor, 8 Barb. 250; Badeau v. Niles, 9 Abb. N. C. 48; Kelly v. Breusing, 33 Barb. 123; Ensign v. Dickinson, 46 State Rep. 845, 19 N. Y. Supp. 438.

[35] Spies v. Munroe, 35 App. Div. 527; Hanson v. Langan, 30 State Rep. 828, 9 N. Y. Supp. 625.

not the evidence which will be required to prove the facts.[36] The rule means that ultimate facts, i. e., facts in issue and not probative facts, matters of evidence, i. e., facts in controversy, should be stated.[37] For instance, if the tort has been waived, on conversion of chattels, and suit brought for goods sold and delivered, the facts establishing the conversion need not be set forth, since they are matter of evidence.[38] So the evidence necessary to support an allegation of fraudulent intent need not be set out in the complaint.[39] Likewise an averment of the consolidation of two corporations under a foreign statute set forth, which alleges that the provisions of the statute had been complied with, is sufficient, without stating the steps taken in compliance, which were merely the evidence thereof.[40] So whether an agreement is in writing is a matter of evidence, and need not be pleaded.[41] In other words, a statement of certain evidence from which the "law" draws a conclusion of fact, is in effect a statement of that fact; but a statement of evidence from which the law would not draw a conclusion of fact, but which would be left to a jury to find one way or the other, although it be so clear that a jury ought to find it only one way, may not be sufficient, in pleading.[42]

§ 790. Facts necessarily implied.

Facts necessarily implied from the statement of other facts should not be stated.[43] And whatever may be inferred logically and directly from the complaint is in judgment of law contained in it.[44] Thus when the statute requires the acceptance of a bill to be in writing, it is sufficient to allege that it was ac-

[36] Wooden v. Strew, 10 How. Pr. 48; Boyce v. Brown, 7 Barb. 80.

[37] Prickhardt v. Robertson, 4 Civ. Proc. R. (Browne) 112.

[38] Doherty v. Shields, 86 Hun, 303, 67 State Rep. 211.

[39] Kain v. Larkin, 141 N. Y. 144.

[40] Rothschild v. Rio Grande Western Ry. Co., 45 State Rep. 809.

[41] Rouget v. Haight, 57 Hun, 119, 32 State Rep. 452; Magnolia Anti-Friction Co. v. Singley, 29 State Rep. 301, 8 N. Y. Supp. 463.

[42] Talman v. Rochester City Bank, 18 Barb. 123, 138.

[43] Bliss, Code Pl. p. 290; Case v. Carroll, 35 N. Y. 385; Hunt v. Bennett, 19 N. Y. 176.

[44] Cowper v. Theall, 4 State Rep. 674, 26 Wkly. Dig. 73.

cepted, the statement implying that it was properly done—that is, in writing.[45] And an allegation that certain drafts were accepted by a corporation, by their treasurer, includes an averment of authority of the treasurer to accept the drafts; inasmuch as the company can not accept by him, unless he has such authority.[46] So an allegation that a bill or note is payable to, or was indorsed to, the plaintiff, implies that he is the owner and holder which need not be alleged.[47] And where acts charged in a complaint are wrongful or necessarily fraudulent, it is not essential to the cause of action that they should be charged as having been wrongfully or fraudulently performed.[48] Likewise where a contract within the statute of frauds is pleaded, it need not be stated that it was in writing.[49]

§ 791. Facts which the law presumes.

When the law presumes a fact it should not be stated.[50] For instance, consideration in a written contract is presumed where the contract is one which imports consideration, such as a writing under seal, or a negotiable promissory note, or a bill of exchange.[51] So where it appears the instrument was given in pursuance of a statute requirement, in a form prescribed thereby, and in a case within the statute, those facts constitute a sufficient consideration to support it, though it be without seal, and no further averment of consideration is necessary.[52] So if it is alleged that money was loaned, it is not necessary to further aver that it is due, as the presumption of law is that it was due at once.[53] This presumption should not be confounded with inferences, however, arising from probative facts, such

45 Bank of Lowville v. Edwards, 11 How. Pr. 216.

46 Partridge v. Badger, 25 Barb. 146.

47 Farmers' & Mechanics' Bank of Genesee v. Wadsworth, 24 N. Y. 547; Keteltas v. Myers, 19 N. Y. 231.

48 Warren v. Union Bank of Rochester, 157 N. Y. 259.

49 Steinberg v. Tyler, 3 Misc. 25; Hurlimann v. Seckendorf, 46 State Rep. 301, 18 N. Y. Supp. 756.

50 1 Chit. Pl. 221.

51 Bliss, Code Pl. p. 289.

52 Slack v. Heath, 4 E. D. Smith, 95, 1 Abb. Pr. 331.

53 Petrakion v. Arbelly, 23 Civ. Proc. R. (Browne) 183.

as the inference that the stronger of two drowning persons will survive.[54]

§ 792. Conclusions of law.

Inasmuch as the Code requires facts to be stated, it is usually improper to allege a mere conclusion of law as an equivalent for a group of separate facts from which it is an inference[55] but facts may be stated according to their legal effect and if the facts stated are such that if they were proved as stated, plaintiff must recover by operation of law, then the complaint sufficiently states facts.[56] But pleading a conclusion of law does not, of necessity, require that it be stricken out on motion where no injury results therefrom and the allegation is in a pleading in equity where it is necessary to show the relations of different acts to each other and to the end which is sought.[57] Allegations of disregard of duty,[58] or of indebtedness,[59] or of heirship,[60] or of ownership,[61] or of the existence and effect of a foreign law,[62] or of fraud,[63] or that defendant discharged plaintiff for good and sufficient cause,[64] or that certain acts were

[54] Bliss, Code Pl. p. 289; Greenleaf Ev. § 44.

[55] Cook v. Warren, 88 N. Y. 37.

[56] Talman v. Rochester City Bank, 18 Barb. 123.

[57] John D. Park & Sons Co. v. National Wholesale Druggists' Ass'n, 30 App. Div. 515.

[58] Spencer v. Wabash R. Co., 36 App. Div. 446; City of Buffalo v. Holloway, 7 N. Y. (3 Seld.) 494.

[59] McKyring v. Bull, 16 N. Y. 303; Lamb v. Hirschberg, 1 Misc. 108.

[60] Reiners v. Brandhorst, 59 How. Pr. 91; Matter of Stephani, 75 Hun, 188.

[61] Adams v. Holley, 12 How. Pr. 326; Thomas v. Desmond, 12 How. Pr. 321. But a mere allegation of acquisition of ownership is usually sufficient except in case of choses in action. Tams v. Witmark, 30 Misc. 293.

[62] Rothschild v. Rio Grande Western Ry. Co., 59 Hun, 454.

[63] Butler v. Viele, 44 Barb. 169; Cohn v. Goldman, 76 N. Y. 284; McMurray v. Gifford, 5 How. Pr. 14; New York & M. V. Transp. Co. v. Tyroler, 25 App. Div. 161. But an intent to defraud may be alleged without stating any fact to show the intent. National Union Bank of Dover v. Reed, 27 Abb. N. C. 5, which is followed by a brief note on the distinction in pleading between fraud and intent to defraud.

[64] Hicks v. New Jersey Car Spring & Rubber Co., 22 Misc. 585.

done in violation of defendant's agreement,[65] or that plaintiff was "duly authorized,"[66] or that a payment of money was not voluntary but compulsory,[67] or that a person was duly appointed,[68] or that a written instrument is invalid,[69] or that a judgment is void,[70] or that an act was illegal and wrongful,[71] or that process is unauthorized,[72] or that plaintiff is not the real party in interest,[73] or that defendant had received money or property to the use of plaintiff,[74] or that plaintiff is entitled to the possession of land and to the rents or profits[75] have been held bad, standing by themselves, on the ground that they were mere conclusions of law.

On the other hand, an allegation of indebtedness followed by the particulars thereof is sufficient.[76] So an allegation that a sum has not been paid[77] or that a person is of unsound mind,[78] or that "due proceedings" have been taken,[79] have been held not to be conclusions of law. And allegations that

[65] Schenck v. Naylor, 9 Super. Ct. (2 Duer) 675.

[66] Myers v. Machado, 6 Abb. Pr. 198, 14 How. Pr. 149, 13 Super. Ct. (6 Duer) 678.

[67] Commercial Bank v. City of Rochester, 41 Barb. 341.

[68] Beach v. King, 17 Wend. 197.

[69] Caryl v. Williams, 7 Lans. 416; Garvey v. Union Trust Co., 29 App. Div. 513.

[70] Town of Ontario v. First Nat. Bank of Andes, 59 Hun, 29, 35 State Rep. 536.

[71] Rector, etc., of St. James Church v. Huntington, 82 Hun, 125; Knapp v. City of Brooklyn, 97 N. Y. 520; Schroeder v. Becker, 22 Wkly. Dig. 261; Thomas v. New York & G. L. Ry. Co., 22 Civ. Proc. R. (Browne) 326, 47 State Rep. 250, 19 N. Y. Supp. 766.

[72] Clark v. Bowe, 60 How. Pr. 98; Sprague v. Parsons, 13 Daly, 553, 11 Civ. Proc. R. (Browne) 17.

[73] Van Dyke v. Gardner, 21 Misc. 542; Gleason v. Youmans, 9 Abb. N. C. 107; White v. Drake, 3 Abb. N. C. 133.

[74] Lienan v. Lincoln, 9 Super. Ct. (2 Duer) 670.

[75] Sheridan v. Jackson, 72 N. Y. 170. So of an allegation as to personal property. Pattison v. Adams, 7 Hill, 126.

[76] Tracy v. Tracy, 59 Hun, 1.

[77] Gruenstein v. Jablonsky, 1 App. Div. 580.

[78] Riggs v. American Tract Soc., 84 N. Y. 330.

[79] McCorkle v. Herrmann, 22 State Rep. 519; Rochester Ry. Co. v. Robinson, 133 N. Y. 242.

an election was duly and legally held,[80] or that a note was duly indorsed by an officer duly authorized,[81] or that a corporation was duly organized,[82] or that the defendant was not the true owner and was not seized of the premises in fee,[83] or that plaintiff has title as owner in fee of real property sought to be recovered,[84] or that with full knowldege of all the facts relating to and connected with the transaction in question, plaintiffs ratified and confirmed the payment made, and elected to consider the same a valid payment to defendants and to look to them for repayment,[85] have been held sufficient though, if not conclusions of law, they are at least mixed questions of law and fact. Furthermore, allegations of negligence, though apparently a conclusion, are held proper, in connection with the facts.[88]

In pursuance of this general rule it is also held that an allegation of a conclusion of law raises no issue,[87] that an allegation of fact will control an allegation of a conclusion of law, that a conclusion of law need not be denied by the opposing party, that conclusions of law are not admitted by failure to deny or by a demurrer,[88] and that, while conclusions are not proper, they may be treated as mere surplusage, where the pleading states sufficient facts in addition to such conclusion.[89]

§ 793. Facts of which courts take judicial notice.

Since facts of which the court will take judicial notice need

[80] People ex rel. Crane v. Ryder, 12 N. Y. (2 Kern.) 433.

[81] Nelson v. Eaton, 26 N. Y. 410.

[82] Lorillard v. Clyde, 86 N. Y. 384.

[83] Woolley v. Newcombe, 87 N. Y. 605.

[84] Walter v. Lockwood, 23 Barb. 228.

[85] Spies v. Munroe, 35 App. Div. 527.

[86] Campbell v. United States Foundry Co., 73 Hun, 576. Negligence is a conclusion of fact. Pizzi v. Reid, 72 App. Div. 162.

[87] Emery v. Baltz, 94 N. Y. 408; Kay v. Churchill, 10 Abb. N. C. 83.

[88] Farrell v. Amberg, 8 Misc. 220, 59 State Rep. 449, 23 Civ. Proc. R. (Browne) 434. Not admitted by demurrer. Masterson v. Townshend, 123 N. Y. 458; Talcott v. City of Buffalo, 125 N. Y. 280.

[89] 12 Enc. Pl. & Pr. 1024-1030. Conclusions of law not necessarily injurious to the opposing party need not always be stricken out. John D. Park & Sons Co. v. National Wholesale Druggists' Ass'n, 30 App. Div. 508, 515.

not be proved, it is unnecessary to plead them. This rule prevailed at common law. The facts of which the court will take judicial notice may be roughly grouped as follows:

1. Matters of common knowledge, such as the natural and artificial subdivisions of time,[90] the fact that pneumonia is a disease,[91] or the normal height of a human body.[92]

2. Historical facts, such as the title of the Holland Land Company under the compact between the states of New York and Massachusetts in 1786,[93] or the actual existence of civil war,[94] or the details of the history of Indian tribes resident in New York.[95]

3. Geographical facts,[96] such as that a town named is in a particular county,[97] or that a judicial district embraces premises described by the street on which they are situated, where the entire street is within the statutory boundaries of such district.[98] But judicial notice will not be taken of the character of a small stream not found on the general maps of the state nor defined in any public statute.[99]

4. Political facts, such as the days of holding general elections.

5. Scientific facts of axiomatic character,[100] such as that kerosene is explosive.[101]

6. Rules of the common law. The common law of another state is presumed, in the absence of evidence, to be the same as the common law of this state.[102]

[90] Upington v. Corrigan, 69 Hun, 320.
[91] Kiernan v. Metropolitan Life Ins. Co., 13 Misc. 39.
[92] Hunter v. New York, O. & W. R. Co., 116 N. Y. 615.
[93] Bissing v. Smith, 85 Hun, 564.
[94] Woods v. Wilder, 43 N. Y. 164.
[95] Howard v. Moot, 64 N. Y. 262.
[96] People v. Snyder, 41 N. Y. 397.
[97] People v. Wood, 131 N. Y. 617.
[98] Armstrong v. Cummings, 20 Hun, 313; People ex rel. Gilmore v. Callahan, 23 Hun, 581.
[99] People ex rel. Adsit v. Allen, 42 N. Y. 378.
[100] Cozzens v. Higgins, 1 Abb. App. Dec. 451.
[101] Wood v. Northwestern Ins. Co., 46 N. Y. 421.
[102] Throop v. Hatch, 3 Abb. Pr. 23; Holmes v. Broughton, 10 Wend. 75.

7. Public statutes, except statutes of foreign states. State courts will take judicial notice of the public acts of the United States,[103] and the United States courts will take judicial notice of the laws and jurisprudence of all the states and territories.[104] Public, as distinguished from private, statutes need not be pleaded.[105] It is sufficient to state facts bringing the case within the statute.[106] But in penal actions the Revised Statutes required a reference to the statute,[107] though it seems that such provisions are repealed by the Code.[108] No reason is apparent why reference should be made to a penal public statute any more than to any other public statute.[109]

The general rule is that a private statute must be pleaded except in so far as it contains provisions of a public or general character.[110] So statutes of foreign countries or of sister states will not be judicially noticed and hence must be pleaded.[111] Likewise, municipal ordinances are not public acts, and must be specially set forth in pleading,[112] except in municipal courts.[113]

8. Terms of court, records, rules of practice and judicial proceedings.[114] This includes previous orders in an action,[115]

[103] Platt v. Crawford, 8 Abb. Pr., N. S., 297; Wheelock v. Lee, 15 Abb. Pr., N. S., 24.

[104] Jack v. Martin, 12 Wend. 311.

[105] Shaw v. Tobias, 3 N. Y. (3 Comst.) 188; O'Brien v. Kursheedt, 61 State Rep. 470, 29 N. Y. Supp. 973.

[106] Carris v. Ingalls, 12 Wend. 70; Goelet v. Cowdrey, 8 Super. Ct. (1 Duer) 132; Haight v. Child, 34 Barb. 186.

[107] 2 Rev. St. p. 480, § 1.

[108] Abbott v. New York Cent. & H. R. R. Co., 12 Abb. Pr., N. S., 465; Schroeder v. Becker, 22 Wkly. Dig. 261. Contra, People v. Bennett, 5 Abb. Pr. 384.

[109] Bliss, Code Pl. 296.

[110] Bretz v. City of New York, 4 Abb. Pr., N. S., 258.

[111] Fagan v. Strong, 17 Civ. Proc. R. (Browne) 438.

[112] People ex rel. Houston v. City of New York, 7 How. Pr. 81; Harker v. City of New York, 17 Wend. 199; Porter v. Waring, 69 N. Y. 250.

[113] Hallahan v. Webber, 15 Misc. 327.

[114] The practice of the court is not, in general, the subject of pleading. Nichols v. Nichols, 9 Wend. 263; Thomas v. Cameron, 17 Wend. 59.

orders of the court of a public nature,[116] that a certain person was a justice of the court,[117] etc.

§ 794. Surplusage, irrelevancy, redundant and scandalous matter.

Irrelevant, redundant, or scandalous matter should not be pleaded. If pleaded, it may be stricken out on the motion of a person aggrieved thereby,[118] provided the motion is noticed before demurring or answering the pleading and within twenty days from the service thereof.[119]

A pleading is irrelevant which has no substantial relation to the controversy between the parties to the action and can in no event affect the decision of the court.[120] For instance, a mere statement of evidence is irrelevant.[121] Irrelevancy corresponds to impertinency in the old chancery system. Therefore, it includes both prolixity or needless details of material matter, and matter out of which no cause or defense could arise between the parties in the particular suit.[122] An answer is irrelevant, when the matter which it sets forth has no bearing on the question in dispute, does not affect the subject-matter of the controversy, and can in no way affect or assist the decision of the court.[123] The test of irrelevancy in an answer is whether the statements claimed to be irrelevant tend to make or constitute a defense.[124] An answer is not irrelevant if it sets up any defense that can be proved at the trial.[125]

[115] Farmers' Loan & Trust Co. v. Hotel Brunswick Co., 12 App. Div. 628, 42 N. Y. Supp. 693.

[116] Matter of Nesmith's Estate, 14 State Rep. 375, 28 Wkly. Dig. 281.

[117] Matter of Gorry, 48 Hun, 29.

[118] Code Civ. Proc. § 545.

[119] Rule 22 of General Rules of Practice.

[120] John D. Park & Sons Co. v. National Wholesale Druggists' Ass'n, 30 App. Div. 508; Cahill v. Palmer, 17 Abb. Pr. 196; Martin v. Kanouse, 2 Abb. Pr. 330.

[121] Schroeder v. Post, 3 App. Div. 411.

[122] Lee Bank v. Kitching, 20 Super. Ct. (7 Bosw.) 664, 11 Abb. Pr. 435.

[123] Jeffras v. McKillop, 2 Hun, 351; Littlejohn v. Greeley, 13 Abb. Pr. 311.

[124] Dovan v. Dinsmore, 33 Barb. 86.

[125] Merritt v. Gouley, 58 Hun, 372.

Thus a denial in proper form of any statement in the complaint cannot be irrelevant, notwithstanding the denial is in form inartificial and insufficient.[126] Irrelevant allegations in an answer do not necessarily make an answer frivolous, since a frivolous answer is one which, assuming its contents to be true, presents no defense to the action, and hence matters of defense may be frivolous though not irrelevant.[127] Matter will not be stricken out as irrelevant if argument is necessary to show the irrelevancy.[128] The irrelevancy must be clear and the danger of false issues something more than barely possible.[129] Even a remote probability that allegations contained in an answer may be pertinent upon the trial of the action by way of explanation, or as connected with the history of the subject-matter of the litigation, is sufficient to protect such allegations from being stricken out as irrelevant on motion.[130] There must also be some evidence that the retention of the allegations would embarrass the defendant in his defense.[131] A defense set up in an original answer is not to be struck out as irrelevant merely because the matter of it arose after suit brought.[132] An irrelevant pleading is "insufficient."[133] Needless repetition of material allegations constitutes redundancy, as well as an insertion of irrelevant matter.[134] For instance, an answer which denies want of probable cause, and, as a subsequent defense, alleged that defendant had probable cause, is redundant.[135]

Every irrelevant allegation is immaterial or redundant, but the converse of this proposition is not true; every immaterial

126 Dovan v. Dinsmore, 33 Barb. 86.

127 Fasnacht v. Stehn, 53 Barb. 650, 5 Abb. Pr., N. S., 338.

128 Gaylord v. Beardsley, 70 Hun, 597, 25 N. Y. Supp. 598.

129 Finger v. City of Kingston, 29 State Rep. 703, 9 N. Y. Supp. 175.

130 Dunston v. Hagerman, 18 App. Div. 146.

131 Lynch v. Second Ave. R. Co., 7 App. Div. 164.

132 Carpenter v. Bell, 24 Super. Ct. (1 Rob.) 711, 19 Abb. Pr. 258.

133 Goodman v. Robb, 41 Hun, 605.

134 John D. Park & Sons Co. v. National Wholesale Druggists' Ass'n, 30 App. Div. 508.

135 Rost v. Harris, 12 Abb. Pr. 446.

or redundant allegation is not irrelevant.[136] Thus, notwithstanding statements in a pleading be unnecessarily, or even improperly elaborated, extended and repeated, if they are relevant to the issue and create material inquiries to be settled at the trial they cannot be stricken out, either as sham or irrelevant.[137]

Matter is scandalous where it is incriminatory or otherwise reflects on the character of an individual, whether a party to the suit or not, or where it is disrespectful to the court.[138]

All matter unnecessarily alleged is surplusage. The term is generally thought to be synonymous with redundant matter. While the terms refer to the same thing yet they are used in different relations and not interchangeably. Unnecessary matter is called redundant when there is an effort to reform the pleadings by striking it out; it is called surplusage when there has been no such effort, in which case it should be disregarded by the court, as if the pleading did not contain it; this distinction, however, is not always taken. The statute uses the term "redundant matter" when authorizing it to be stricken out; while common-law pleaders speak of such matter as surplusage, though generally when treating of what may be regarded upon the trial.[139] For instance, where a complaint alleged a sale of goods which had not been paid for and that defendant obtained them by false representations which were not proved, although the sale was, a refusal to nonsuit was held not error, since a cause of action was made out and the allegations of fraud might be disregarded as surplusage.[140]

ART. IV. MODE OF STATING FACTS, §§ 795-799.

136 Pom. Code Rem. 629; Bowman v. Sheldon, 7 Super. Ct. (5 Sandf.) 657.

137 Nordlinger v. McKim, 38 State Rep. 886, 14 N. Y. Supp. 515.

138 19 Enc. Pl. & Pr. 195.

139 Bliss, Code Pl. § 215.

140 Dodge v. Eckert, 71 Hun, 257.

§ 795. Plain, ordinary and concise language.

Facts must be stated in "plain, ordinary and concise language, without unnecessary repetition."[141] This Code rule is antagonistic to the requirement in common-law pleadings, that they should observe the known and ancient forms of expression, as contained in approved precedents, and that they should observe certain formulas in their commencement and conclusion—as, the production of suit, the actio non, the precludi non, the conclusion to the country or with a verification, etc. Instead of the artificial style "contained in approved precedents," the pleader should use plain and ordinary language, and the formulas referred to are omitted altogether. It is not, however, to be understood that all the modes of stating facts contained in the precedents, especially in actions of trespass on the case, are to be condemned as artificial. Some of them, leaving out the formulas and making the averment di-

[141] Code Civ. Proc. §§ 481, 500.

rect instead of by way of recital, cannot be made more plain and concise, and they are not to be rejected because, merely, they are in use under another system.[142]

Ordinary language means such language as is established and customary. It has reference to the established and customary use of legal terms, at the time when the Code was enacted.[143]

Repetition to secure the rights of the party or prevent injustice is not forbidden, the evil aimed at being unnecessary repetition and not repetition made necessary by the peculiar circumstances of the case.[144] The early decisions under the Code held that the practice of setting forth a single cause of action in different counts was abolished by the Code and the practice was to compel plaintiff to elect or to strike out all but one on motion before the trial.[145] But this rule was modified and it was held that where it can be seen that the statement of each cause of action is probably needful in order to prevent a failure of justice, in consequence of a variance between the pleading and the proof, such statement, provided it be plain and concise, should not be regarded as "unnecessary repetition" within the meaning of the Code.[146] The practice of using several counts for one cause of action corresponds to the practice in chancery of framing a bill with a double aspect.[147] Where plaintiff has a good cause of action, but it is

[142] Bliss, Code Pl. § 319.

[143] Bell v. Yates, 33 Barb. 627.

[144] Schuyler v. Peck, 29 State Rep. 660, 8 N. Y. Supp. 849.

[145] Stockbridge Iron Co. v. Mellen, 5 How. Pr. 439; Lackey v. Vanderbilt, 10 How. Pr. 155; Churchill v. Churchill, 9 How. Pr. 552; Dunning v. Thomas, 11 How. Pr. 281; Whittier v. Bates, 2 Abb. Pr. 477; Nash v. McCauley, 9 Abb. Pr. 159; Fern v. Vanderbilt, 13 Abb. Pr. 72; Hepburn v. Babcock, 9 Abb. Pr. 159, note; Roberts v. Leslie, 46 Super. Ct. (14 J. & S.) 76.

See note on pleading several grounds of recovery on alternative and inconsistent allegations, in 24 Abb. N. C. 326.

[146] Blank v. Hartshorn, 37 Hun, 101; Rothchild v. Grand Trunk Ry. Co., 30 State Rep. 642, 19 Civ. Proc. R. (Browne) 53; Jones v. Palmer, 1 Abb. Pr. 442; Birdseye v. Smith, 32 Barb. 217; Longprey v. Yates, 31 Hun, 432.

[147] Wood v. Seely, 32 N. Y. 105; Stevens v. City of New York, 84

uncertain in which of two forms he should sue for it, he may adopt the narrative mode of stating the facts, as was frequently done in a bill in chancery, and sometimes in an action on the case. Thus he may allege a contract on which he seeks to hold the defendant liable, and also a judgment recovered by him thereon in another state, as one cause of action; or in an action on a note, in which it may be that defendant could show some usury, he may set forth also the original consideration of the note, thus stating the origin of the first indebtedness, and the securities or evidences of debt subsequently taken for it, claiming still only one payment for the whole, as one only is due.[148] So, in an action for property sold under mortgage, the plaintiff may state both that the mortgage was usurious, and that the foreclosure sale was void for other reasons.[149]

§ 796. Duplicity.

Duplicity, at common law, has been defined as the union of more than one cause of action in one count in a declaration or more than one defense in one place or more than a single breach in a replication.[150] A plea was double where it set up two good defenses though it might contain as many facts as necessary to constitute one defense. "Duplicity" or "doubleness" in a complaint under the Code is defined as the union in one statement of matters constituting two or more causes of action either to support a single right of recovery—as, in duplicity at common law—or distinct recoveries based on each cause of action.[151] The pleading is equally double whether the single statement embraces causes of action that might have been properly united had they been separately stated, or causes of action the union of which is altogether forbidden.[152]

N. Y. 305; Scheu v. New York, L. & W. R. Co., 12 State Rep. 99; Newcombe v. Chicago & N. W. R. Co., 28 State Rep. 716.

148 Thompson v. Minford, 11 How. Pr. 273.

149 Young v. Edwards, 11 How. Pr. 201; Wood v. Seely, 32 N. Y. 105.

150 Cyc. Law. Dict. 304.

151 Bliss, Code Pl. § 290.

152 Bliss, Code Pl. § 290.

§ 797. Definiteness and certainty.

The Code provides that "where one or more denials or allegations, contained in a pleading, are so indefinite or uncertain that the precise meaning or application thereof is not apparent, the court may require the pleading to be made more definite and certain, by amendment."[153] Definiteness in pleadings means exactness and determinativeness. It is embraced in the more comprehensive meaning given by the authorities to the word "certainty" which is defined to be clearness or distinctiveness, as opposed to undue generality.[154] An answer is indefinite when the precise nature of the defense is not apparent.[155] That an answer is frivolous does not necessarily make it indefinite and uncertain[156] and a pleading may be definite notwithstanding it fails to state details, information concerning which may be obtained by requiring a bill of particulars.[157] At common law certainty "to a common intent" was sufficient. Certainty to a reasonable extent is required under the Code.[158] The pleading is sufficient unless plainly indefinite and uncertain[159] and such indefiniteness and uncertainty must appear on the face of the pleading.[160]

As illustrating this rule requiring definiteness and certainty the following have been held indefinite and uncertain, viz: where an answer fails to state whether the facts pleaded amount to a partial or complete defense;[161] where the amount due on each of two causes of action is not separately stated;[162] where causes of action are improperly joined;[163] and where

153 Code Civ. Proc. § 546; Winchester v. Browne, 27 State Rep. 359; O'Brien v. Ottenberg, 59 State Rep. 379; Rouget v. Haight, 57 Hun, 119.

154 6 Enc. Pl. & Pr. 248.

155 Pacific Mail Steamship Co. v. Irwin, 67 Barb. 277.

156 Kelly v. Sammis, 25 Misc. 6.

157 Rouget v. Haight, 57 Hun, 119.

158 Corbin v. George, 2 Abb. Pr. 465; Madden v. Underwriting Printing & Publishing Co., 10 Misc. 27, 63 State Rep. 242; Brownell v. National Bank of Gloversville, 13 Wkly. Dig. 371.

159 People v. Tweed, 63 N. Y. 194.

160 Brown v. Southern Michigan R. Co., 6 Abb. Pr. 237.

161 Simmons v. Simmons, 21 Abb. N. C. 469.

162 Clark v. Farley, 10 Super. Ct. (3 Duer) 645.

163 Cohn v. Jarecky, 90 Hun, 266, 70 State Rep. 601.

the complaint seems to contain the statement of facts necessary to sustain two distinct causes of action and such causes of action are not separately stated and numbered.[164] On the other hand, an allegation that there was mistake or fraud in an account stated is sufficiently definite, where the opposing parties have derived therefrom a reasonably clear idea of the basis on which the action proceeds.[165] So a pleading is not indefinite or uncertain merely because the items of damages sustained are not fully set out.[166] And if a pleading is sufficient in so far as its general allegations are concerned, the specific facts which lead to the general conclusion alleged will not be required to be set forth.[167]

Definiteness and certainty are required, notwithstanding the party is acquainted with all the facts by virtue of another action pending,[168] though if the opposing party is shown to be possessed of equal information respecting the allegations complained of, and the circumstances connected therewith, the pleading is sufficiently definite.[169] The degree of certainty required depends somewhat on circumstances. For instance, a person who seeks to set aside and cancel an instrument executed by him while intoxicated will not be required to be exact in detailing the transaction.[170] So if the written instrument relied on is lost, the precise terms thereof cannot, of course, be pleaded.[171] The common law rule was that where the facts which constitute the plaintiff's cause of action, are supposed to lie in the knowledge of the defendant, but not of the plaintiff, less particularity of statement is required in the declaration, than would otherwise be necessary.[172] So it was a common law rule that wherever a subject comprehends a multiplicity of matters generality of pleading is

164 Commercial Bank of Keokuk v. Pfeiffer, 22 Hun, 327.

165 Stern v. Ladew, 51 State Rep. 456, 22 N. Y. Supp. 116.

166 Whitner v. Perhacs, 25 Abb. N. C. 130.

167 Loewenthal v. Philadelphia Rubber Works, 45 State Rep. 332.

168 Ottman v. Fletcher, 23 Abb. N. C. 430.

169 Cook v. Matteson, 33 State Rep. 497, 19 Civ. Proc. R. (Browne) 321, 11 N. Y. Supp. 572.

170 Brinkerhoff v. Perry, 12 Wkly. Dig. 459.

171 Kellogg v. Baker, 15 Abb. Pr. 286.

172 Van Rensselaer v. Jones, 2 Barb. 643; Gaffney v. Colvill, 6 Hill, 567.

allowed. But this rule is to be taken with the qualification that where there is anything specific in the subject, though consisting in a number of particulars, they must all be enumerated.[173]

This rule as to definiteness and certainty is applied not only to the complaint but also to counterclaims,[174] and the reply,[175] though it does not apply to mere denials.[176]

Exhibits attached to a pleading in the cause may render another pleading definite and certain where it would otherwise be open to such objection.[177]

The rule of certainty does not apply to collateral, irrelevant, redundant, or immaterial allegations.[178]

Now the remedy for indefiniteness and uncertainty is by a motion to make the pleading more definite and certain. It is not ground of demurrer. If no motion is made, the objection cannot be thereafter raised. The motion to make definite and certain is a substitute for a special demurrer.[179] Indefiniteness and uncertainty may be cured by amendment,[180] by allegations in the opposing pleading, by verdict, or by a finding of the court where the trial is by the court without a jury. It is waived where a party goes to trial without raising the objection, or where he proceeds in the cause by taking other steps without raising the question by a motion to make more definite and certain. Noticing a case for trial waives the right to require a pleading to be made more definite and certain.[181]

As examples of defects which violate the rule requiring definiteness and certainty, which will now be noticed separately, may be mentioned (a) argumentativeness, (b) ambiguity, (c) alternative averments, (d) matters of inference, (e) re-

[173] Van Ness v. Hamilton, 19 Johns. 349; Cooper v. Greeley, 1 Denio, 347.

[174] Rouget v. Haight, 57 Hun, 119.

[175] Risley v. Carll, 1 Month. Law Bul. 52.

[176] Hughes v. Chicago, M. & St. P. Ry. Co., 45 Super. Ct. (13 J. & S.) 114.

[177] People v. New York City Underground Ry. Co., 39 State Rep. 571.

[178] 6 Enc. Pl. & Pr. 253.

[179] Kellogg v. Baker, 15 Abb. Pr. 286.

[180] See post, §§ 900-908.

[181] Kellogg v. Baker, 15 Abb. Pr. 286.

citals, (f) hypothetical statements, (g) contradictory statements, (h) negatives pregnant, (i) statements on information and belief, and (j) conclusions of law.[182]

—— **Argumentativeness.** Argumentative pleading is where the affirmative existence of a fact is left to inference or argument. This vice will be seldom found in a complaint, although in pleading by copy a plaintiff may aver a fact argumentatively—as, consideration,—by omitting to state it directly, but by giving, as part of his pleading, a copy of the contract sued on, which states that the promise was made for value received.[183] It is sufficient, however, that the requisite allegations can be fairly gathered from all the averments in the complaint, though the statement of them may be argumentative, and the complaint deficient in technical language.[184] An argumentative or inferential averment can be attacked only by a motion to compel the pleading to be made more definite and certain.[185] If not so attacked, evidence in support thereof must be admitted on the trial.[186]

—— **Ambiguity.** Pleadings are not objectionable as ambiguous, if clear enough according to reasonable intendment and construction, though not worded with absolute precision.[187] The vice of ambiguity is not fatal on general demurrer or on error, unless the obscurity is such that no cause of action or no defense, can be made out by a liberal construction in furtherance of the object of the pleader; but, still, it is a vice going to the form of statement, which will be corrected on motion, and at the pleader's costs.[188]

—— **Alternative statements.** Alternative or disjunctive allegations violate the rule requiring certainty and definiteness, as where it is alleged that defendant made a certain representation, "or" another, "or" still another.[189] Such a pleading is generally condemned but has been sanctioned where

182 6 Enc. Pl. & Pr. 267-271.
183 Bliss, Code Pl. § 316; Prindle v. Caruthers, 15 N. Y. 425.
184 Zabriskie v. Smith, 13 N. Y. (3 Kern.) 322.
185 Cowper v. Theall, 4 State Rep. 674, 26 Wkly. Dig. 73.
186 Brown v. Richardson, 20 N. Y. 472.
187 Royce v. Maloney, 58 Vt. 437.
188 Bliss, Code Pl. § 315.
189 Corbin v. George, 2 Abb. Pr. 465.

plaintiff really has two or more distinct and separate grounds for the relief demanded or where he is uncertain as to the exact ground of recovery the proof may afford.[190] That a plaintiff seeking equitable relief may draw his pleading with a double aspect, as in chancery pleading, has already been noticed in another connection.[191] The conclusions drawn after an extended review of the cases in a note in Abbott's New Cases are as follows:

1. A plaintiff who has several grounds, each of which is enough to sustain the same recovery upon the same transaction or subject matter, may state each as a separate cause of action demanding only one recovery therefor, unless one requires an allegation absolutely inconsistent as matter of fact with an allegation in another.

2. Where such inconsistency would be involved, then, if the inconsistency is in respect to a matter not presumably within his knowledge, nor within his means of knowledge in advance of the trial, and is such that disagreement of the jury upon a special question respecting the point would not impair a general verdict in his favor, he may state the several grounds in the alternative in a single cause of action, provided he does not necessarily embarrass the defense, nor leave the defendant unreasonably in the dark as to what questions of fact he must be prepared to try. For instance, in seeking the reformation of an instrument, plaintiff may allege in the alternative that the insertion of the provision in question was without the knowledge of any of the parties, or without the knowledge of one, the other having the knowledge but concealing it.[192] But if a trial has onee been had and thereafter leave is sought to serve an amended complaint averring several distinet facts, and then adding in sub-

[190] Velie v. Newark City Ins. Co., 12 Abb. N. C. 309, 65 How. Pr. 1.

For extended note on pleading several grounds of recovery and of alternative and inconsistent allegations, see 24 Abb. N. C. 326.

See, also, Hasberg v. Mutual Life Ins. Co., 80 N. Y. Supp. 867; Pittsfield Nat. Bank v. Tailer, 60 Hun, 130; Zimmerman v. Kinkle, 108 N. Y. 282.

[191] See ante, p. 837.

[192] Christopher & T. St. R. Co. v. Twenty-Third St. Ry. Co., 78 Hun, 462, 60 State Rep. 774, 29 N. Y. Supp. 233.

stance that if they are not true, then some or one of certain other statements inconsistent therewith are true, it will be refused since in such a case, where the party has knowledge of the facts, alternative allegations will not be allowed.[193]

——**Inconsistency.** The allegations in a pleading should be consistent and not contradict each other. This fault is sometimes spoken of as repugnancy which is defined as some contrariety or inconsistency between different allegations of the same party.[194] If two inconsistent causes of action are set forth in a complaint, a motion to compel an election should be made before answering though it is proper for the court to compel the plaintiff at the trial to elect on which he will rely.[195] But if the inconsistency between two causes of action appears upon the face of a complaint, and defendant waits until the trial before moving to compel plaintiff to elect, the court may, in its discretion, wait until part or all of the evidence is taken before deciding the motion, and its denial is so far discretionary that it will not be reviewed, when it appears that the defendant was not harmed.[196] If the mode of trial, whether by court or jury, depends on whether the allegations of the complaint be based on a nuisance or a trespass, plaintiff may be compelled to elect at the opening of the trial at special term, whether he will proceed as for nuisance or trespass.[197]

The former Code of Procedure[198] permitted a defendant to set forth in his answer as many defenses and counterclaims as he might have; and under this system of pleading it was repeatedly held that defenses which were utterly inconsistent with each other might be properly united in the same pleading as, by way of illustration, a denial of speaking the words, and an allegation that the words spoken were true, in an ac-

193 Saltus v. Genin, 16 Super. Ct. (3 Bosw.) 639.

194 18 Enc. Pl. & Pr. 738.

195 Stewart v. Huntington, 124 N. Y. 127; Mayo v. Knowlton, 134 N. Y. 250; Roberts v. Leslie, 46 Super. Ct. (14 J. & S.) 76.

196 Tuthill v. Skidmore, 124 N. Y. 148.

197 Libman v. Manhattan Ry. Co., 26 Abb. N. C. 423, 59 Hun, 428; Pennsylvania Coal Co. v. Delaware & Hudson Canal Co., 3 Abb. App. Dec. 470.

198 Code Proc. § 150.

tion of slander,[199] or a denial and justification of the taking in an action of replevin.[200] When the present Code of Civil Procedure was enacted in 1876 an attempt was made to impose a limit upon a defendant's right to plead separate and distinct defenses by requiring that "they must not be inconsistent with each other."[201] But, in 1879,[202] the words above quoted were stricken from the section, so that now, as formerly, a defendant, without any restriction, may set forth in his answer "as many defenses or counterclaims, or both, as he has";[203] and it matters not whether they are consistent or inconsistent with each other.[204] A defendant is sometimes required to elect upon which of two inconsistent defenses he will rely, but this is done only where, from the very nature of the case, it is impossible for him to avail himself of both.[205]

—— **Recitals of facts.** Facts should be stated, alleged, averred, and not given by way of recital.[206]

—— **Hypothetical statements.** Hypothetical, i. e. contingent, statements should not be used. For instance, if an answer alleges that "if" defendant spoke any slanderous words, they were confidential and privileged, it is a hypothetical pleading.[207] Likewise an allegation that if he did speak and publish the several slanderous words, etc., the same were true;[208] or, if the plaintiffs are the owners and holders of a promissory note named, the said note was obtained by fraud;[209] or, if any ditch or trench was dug without the knowledge, etc., or, if said plaintiff's wife fell in, it was in consequence, etc.; or, if such ditch or trench was dug, it was well and suffi-

[199] Buhler v. Wentworth, 17 Barb. 649.

[200] Hackley v. Ogmun, 10 How. Pr. 44.

[201] L. 1876, c. 448, § 507.

[202] L. 1879, c. 542.

[203] Code Civ. Proc. § 507.

[204] Bruce v. Burr, 67 N. Y. 237; Goodwin v. Wertheimer, 99 N. Y. 149; Societa Italiana Di Beneficenza v. Sulzer, 138 N. Y. 468.

[205] Wendling v. Pierce, 27 App. Div. 517; Breunich v. Weselman, 100 N. Y. 609; Hollenbeck v. Clow, 9 How. Pr. 289.

[206] Bliss, Code Pl. § 318.

[207] Goodman v. Robb, 41 Hun, 605.

[208] Sayles v. Wooden, 6 How. Pr. 84.

[209] McMurray v. Gifford, 5 How. Pr. 14.

ciently guarded.[210] But hypothetical pleadings are sometimes allowable from necessity[211] and such a statement is good on the trial.[212]

——**Negatives pregnant.** A negative pregnant is such a form of denial as implies an affirmative and is susceptible of a double meaning. Denials in the form of a negative pregnant arise (1) when the allegation is of a single fact with some qualifying or modifying circumstance and the traverse is in ipsis verbis, using exactly the same language and no more; and (2) when the allegation is of several distinct and separate facts or occurrences connected by the copulative conjunction and the traverse is in ipsis verbis of the same facts and occurrences also connected by the same conjunction.[213] For instance an answer consisting of separate denials, of parts of the complaint which each denial sets out and denies in haec verba, is a negative pregnant where pregnant with a substantial truth of the allegations professedly denied.[214] So a reply denying the allegation of a counterclaim in the words of the answer may be a negative pregnant.[215] Such a pleading is subject to a motion to make more definite and certain.[216] While denials in the form of negatives pregnant do not necessarily constitute bad pleading, if under the circumstances set forth they are not indefinite, uncertain or ambiguous,[217] yet the form of denial in haec verba, while often used, is not good pleading as a general rule, and it is much the better and simpler practice to merely deny "each and every allegation" excepting the allegations which the pleader desires to admit.

——**Averments on information and belief.** While facts peculiarly within the knowledge of the pleader should be alleged positively and not on information and belief, yet, where the facts pleaded are not presumptively within the pleader's

210 Wies v. Fanning, 9 How. Pr. 543.
211 Dovan v. Dinsmore, 33 Barb. 86.
212 Brown v. Ryckman, 12 How. Pr. 313.
213 Pom. Code Rem. 698.
214 Kelly v. Sammis, 25 Misc. 6.
215 Pigot v. McKeever, 32 Misc. 45.
216 Pfaudler Process Fermentation Co. v. McPherson, 20 State Rep. 473, 3 N. Y. Supp. 609.
217 Parker v. Tillinghast, 1 State Rep. 296.

knowledge, he may plead them upon information and belief;[218] and an allegation that the party "believes" a fact to exist is equivalent to an allegation that the fact exists as "he believes."[219] It is not necessary to distinguish the allegations which are made on information and belief[220] and an averment of belief is sufficient without averring information.[221]

—— **Conclusions of law.** That a pleading should not state a conclusion of law has been already stated.[222] Whether a pleading stating a conclusion of law is demurrable or merely subject to a motion would seem to depend on whether anything in addition to the legal conclusion is stated.[223]

§ 798. Illustrations of facts required to be definitely stated.

At common law, it was necessary that pleadings be certain as to time and place; that they specify quantity, quality, value, and the names of persons; and that they show title and authority to sue.

—— **Time.** The common law rule was that both time and place of every traversable fact should be stated.[224] The rules in regard to time as enforced in common law and Code pleading are substantially the same. The Code rule is that the time when a fact happened must be stated, if it is material to the cause of action or defense.[225] Thus, where an action for a statute penalty cannot be begun until ten days after a certain event, a statement that the event occurred "on or about" a specified day, ten days prior to the beginning of the action, is too uncertain.[226] But in pleading a written in-

[218] St. John v. Beers, 24 How. Pr. 377.

Allegations on information and belief are recognized as good pleading by section 524 of the Code which prescribes the construction to be placed on allegations or denials not stated to be made on information and belief.

[219] Howell v. Fraser, 6 How. Pr. 221; Radway v. Mather, 7 Super. Ct. (5 Sandf.) 654.

[220] Truscott v. Dole, 7 How. Pr. 221; Ricketts v. Green, 6 Abb. Pr. 82.

[221] Radway v. Mather, 7 Super. Ct. (5 Sandf.) 654.

[222] See ante, § 792.

[223] Knapp v. City of Brooklyn, 97 N. Y. 520.

[224] Gillet v. Fairchild, 4 Denio, 80; Barnes v. Matteson, 5 Barb. 375.

[225] People ex rel. Crane v. Ryder, 12 N. Y. (2 Kern.) 439.

[226] Barlow v. Pease, 5 Hun, 564.

strument, if the only materiality of the date is that it was after another event, it is sufficient to say that it was so.[227] And if an act is capable of being committed on several days, it may be described as having been committed on such a day and divers other days and times between that day and the commencement of the action.[228] The time alleged in actions ex delicto of the act complained of is generally an immaterial averment.[229]

—— **Place.** Inasmuch as the fictitious venue of common law pleadings is unknown, the place where a transaction occurred or where a contract was made need be stated only where it is material to the cause of action and the jurisdiction of the court.

—— **Quantity, quality and value.** In an action for injuries to property or for the recovery of real property, quantity and quality should be shown and, in addition thereto, value should be shown where the property is personal.[230]

—— **Names of persons.** The names of parties to an action must be clearly designated by their proper names and not by words of description, and it must be shown whether they appear in the action in an individual or representative capacity. The complaint must be definite as to whether it is intended to charge defendant personally or officially.[231] So the names of all third persons mentioned in the pleadings, must be correctly stated.

—— **Subject-matter of the action.** The subject-matter of the action must be definitely stated, as where the subject-matter is real property sought to be recovered.[232]

—— **Title.** Where title is material, it must be shown except where the opposite party is estopped from denying it or where the action is founded on mere possession.

227 Kellogg v. Baker, 15 Abb. Pr. 286.
228 Dubois v. Beaver, 25 N. Y. 123.
229 Critelli v. Rodgers, 87 Hun, 530.
230 Steph. Pl. (Tyler's Ed.) 28.
231 Seasongood v. Fleming, 74 Hun, 639, 26 N. Y. Supp. 831, 57 State Rep. 203.
232 Brinkerhoff v. Perry, 59 How. Pr. 156, note.

§ 799. Statutory exceptions to general rules requiring definiteness and certainty.

The common law rule that allegations in a pleading must be definite and certain has been somewhat modified by statutes which will now be considered.

——**Pleading private statute.** In pleading a private statute, or a right derived therefrom, it is sufficient to designate the statute by its chapter, year of passage, and title, or in some other manner with convenient certainty, without setting forth any of the contents.[233] Private statutes are such as affect in a peculiar manner certain persons or classes[234] while public statutes are those which affect the public at large, whether their operation be throughout the state or in a particular locality.[235]

As to the mode of pleading foreign statutes there is much difference of opinion and it is difficult to lay down any general rule. It can safely be said that the statute need not be set forth in haec verba and that it is sufficient to aver its substance.[236] As against a demurrer, it is sufficient to aver their legal effect, without setting them forth at length.[237] But some of the New York cases seem to go even further in allowing general allegations in regard thereto. For instance, it has

[233] Code Civ. Proc. § 530.

[234] Cyc. Law Dict. 870; People ex rel. Lee v. Board Sup'rs of Chautauqua County, 43 N. Y. 10.

[235] Cyc. Law Dict. 870.

[236] Kipp v. McLean, 2 Civ. Proc. R. (McCarty) 166.

Under a complaint alleging "that by the laws of said commonwealth, the plaintiff is now and always has been competent to take and hold said legacy, and to sue for and recover the same;" and that at the time of the death of the testator "it was and still is the law of said commonwealth, that incorporated and unincorporated religious societies may appoint trustees, not exceeding five in number, to hold and manage bequests for their benefit," and that "before the commencement of this action the plaintiff duly appointed three trustees to hold and manage said bequest * * * and that each of said trustees has accepted his said appointment, and that said trustees are ready and prepared to receive said bequest and administer it according to law," it was held that the laws of the commonwealth of Massachusetts could be proved. Congregational Unitarian Soc. v. Hale, 29 App. Div. 396.

[237] Robarge v. Central Vermont R. Co., 18 Abb. N. C. 363.

been held that an averment that "under and pursuant" to the laws of a sister state, suits might be brought in the name of a corporation, under certain circumstances,[238] or that "under and by virtue of the laws of France," the title to property vested immediately in plaintiffs, was sufficient.[239] So an allegation that a foreign surrogate had jurisdiction "and was duly authorized and empowered by the laws of the state of New Jersey to issue said letters" has been held sufficient to authorize proof of the laws of New Jersey, in the absence of a motion to make more definite and certain.[240] But it has been held not sufficient to allege that "under the laws of, etc., all the debts, etc., of specified consolidating companies respectively attached to the defendant (the new corporation), and become enforceable against it to the same extent as if incurred or contracted by it," because stating a mere conclusion,[241] though it would seem that if the law had been stated as a general rule of law and then followed up with the facts, the averment would have been sufficient.[242] So it is insufficient to merely allege the conclusion that the law of a sister state is the same as that of New York.[243] The safest and best mode of pleading a defense founded on statute, is to follow its words, since the same construction must be given to the words in the plea as in the statute.[244] In declaring on a penal statute it is sufficient to follow the words of the statute in stating the offense and it is not necessary to conclude "against the form of the statute."[245] In stating a cause of action arising upon a statute where an exception is incorporated in the body of the clause of a statute, the pleader ought to plead

238 O'Reilly v. Greene, 18 Misc. 423.

239 Berney v. Drexel, 33 Hun, 34.

240 Schluter v. Bowery Sav. Bank, 117 N. Y. 125; disapproving Throop v. Hatch, 3 Abb. Pr. 24.

241 Rothschild v. Rio Grande Western Ry. Co., 26 Abb. N. C. 312, 59 Hun, 454, 37 State Rep. 44, 20 Civ. Proc. R. (Browne) 197. To same effect, see Riendeau v. Vieu, 50 State Rep. 309, 21 N. Y. Supp. 501.

242 For note in connection with this case reviewing generally the mode of pleading foreign statutes, see 26 Abb. N. C. 315.

243 Fagan v. Strong, 17 Civ. Proc. R. (Browne) 438.

244 Ford v. Babcock, 7 N. Y. Leg. Obs. 270, 4 Super. Ct. (2 Sandf.) 518; Cole v. Jessup, 10 N. Y. (6 Seld.) 96.

245 People v. Bartow, 6 Cow. 290.

the exception. But where there is a clause for the benefit of the pleader and afterwards follows a proviso which is against him, he may plead the clause and leave it to his adversary to show the proviso.[248]

If it is desired to show the construction placed on a statute of a sister state which is pleaded, it is sufficient to aver that the highest appellate court of such state has held a certain way without setting forth the facts appearing in the case referred to or giving its title or stating where reported.[247]

—— **Pleading items of an account.** As will be more fully noticed hereafter,[248] the Code provides that the items of an account alleged in a pleading need not be set forth though a copy of the account must be delivered to the adverse party on his making demand therefor within ten days.[249]

—— **Pleading judgments.** The common-law rule was that, in pleading judgments of inferior courts of special and limited jurisdiction, a general averment of jurisdiction was not sufficient. The facts upon which jurisdiction depended were required to be stated, and it was necessary to show that the court acquired jurisdiction of the person as well as that it had jurisdiction of the subject-matter.[250] The Code modified this rule and it is now provided that "in pleading a judgment, or other determination, of a court or officer of special jurisdiction, it is not necessary to state the facts conferring jurisdiction; but the judgment or determination may be stated to have been duly given or made. If that allegation is controverted, the party pleading must, on the trial, establish the facts conferring jurisdiction."[251] It is necessary, however, under this provision, to designate the officer[252] and to use the words "duly given or made" or their equivalent.[253]

246 Rowell v. Janvrin, 151 N. Y. 60.

247 Angell v. Van Schaick, 132 N. Y. 187.

248 See post, §§ 801-804.

249 Code Civ. Proc. § 531.

250 Turner v. Roby, 3 N. Y. (3 Comst.) 193; Tuttle v. Robinson, 91 Hun, 187.

251 Code Civ. Proc. § 532.

252 An averment that such determination was duly made is insufficient. Carter v. Koezley, 22 Super. Ct. (9 Bosw.) 583, 14 Abb. Pr. 147.

253 Tuttle v. Robinson, 91 Hun, 187. Merely alleging that judg-

Whether this provision applies to foreign judgments is involved in some doubt but it seems that it does.[254]

——**Pleading performance of conditions precedent.** In an action based on a contract to recover for a breach thereof, the complaint must show an existing contract and the performance by the plaintiff of such conditions precedent as are thereby provided or a tender of their performance, or some adequate excuse for non-performance.[255] At common law plaintiff was required to plead performance of a condition precedent by showing time, place and manner of performance, or to give a good reason or excuse for non-compliance. The Code provides as follows: "In pleading the performance of a condition precedent in a contract, it is not necessary to state the facts constituting performance; but the party may state, generally, that he, or the person whom he represents, duly performed all the conditions on his part. If that allegation is controverted, he must, on the trial, establish performance."[256] So if there is a requirement in a building contract of an architect's certificate before payment, the performance of conditions precedent may be set forth by alleging generally that plaintiff has duly performed all the conditions of the agreement.[257] This provision covers not only conditions expressly stated in the contract sued on but also conditions implied by law,[258] as in case of the contract of indorsement of a note[259] such as presentment, etc.[260] It applies to such acts as demand and notice.[261]

This Code rule does not, however, authorize a mere averment of excuse for non-performance without stating the facts.

ment was entered is insufficient. Hunt v. Dutcher, 13 How. Pr. 538.

254 Halstead v. Black, 17 Abb. Pr. 227. In De Nobele v. Lee, 47 Super. Ct. (15 J. & S.) 372, the rule is stated to be in doubt.

255 Bogardus v. New York Life Ins. Co., 101 N. Y. 328.

256 Code Civ. Proc. § 533.

257 Fox v. Cowperthwait, 60 App. Div. 528; Weeks v. O'Brien, 141 N. Y. 199; Smith v. Wetmore, 167 N. Y. 234.

Pleading notice, see 14 Enc. Pl. & Pr. 1066.

258 Adams v. Sherrill, 14 How. Pr. 297.

259 Adams v. Sherrill, 14 How. Pr. 297; Youngs v. Perry, 42 App. Div. 247; Brownell v. Town of Greenwich, 114 N. Y. 527.

260 Ferner v. Williams, 14 Abb. Pr. 215.

261 Case v. Phoenix Bridge Co., 10 State Rep. 474, 55 Super. Ct. (23 J. & S.) 25.

An excuse for not performing any requisite condition precedent to liability must be expressly set forth.[262] It is not sufficient to aver that plaintiff has duly complied with all the conditions precedent, except in so far as such compliance and observance have been waived or rendered unnecessary by the position and action of the defendant, where the facts and circumstances constituting the waiver are not set forth.[263] Nor does it apply where plaintiff specifically sets out in his complaint, a condition precedent to be performed by him, and then fails to allege performance of such condition in specific terms.[264]

The statement of due performance need not be in the precise language of the Code[265] though it has been held that it is necessary to plead performance substantially in the words of the statute.[266] It follows that it is sufficient to allege that the conditions were "fully and faithfully" performed,[267] but it is not sufficient to state that the party has "performed all the conditions on his part" where the word "duly" is omitted before the word "performed."[268] But a complaint which omitted an express averment of performance of condition precedent, has been held sufficient, in absence of motion to make more definite and certain, where the facts constituting such performance were argumentatively and inferentially alleged.[269] An allegation of performance in the very words of the contract is equivalent to pleading that the conditions were "duly performed"[270] and a statement that due and timely protests, etc., in writing, were filed, is sufficient.[271]

[262] Goodwin v. Cobe, 24 Misc. 389.

[263] Todd v. Union Casualty & Surety Co., 70 App. Div. 52; Smith v. Brown, 17 Barb. 431.

[264] Dalzell v. Fahys Watch Case Co., 60 Super. Ct. (28 J. & S.) 293.

[265] Adams v. Sherrill, 14 How. Pr. 297.

[266] Les Successeurs D'Arles v. Freedman, 53 Super. Ct. (21 J. & S.) 518.

[267] Rowland v. Phalen, 14 Super. Ct. (1 Bosw.) 44.

[268] Clemens v. American Fire Ins. Co., 70 App. Div. 435, 109 State Rep. 484.

[269] Cowper v. Theall, 4 State Rep. 674, 26 Wkly. Dig. 73.

[270] Ohlsen v. Equitable Life Assur. Soc., 25 Misc. 230.

[271] Prickhardt v. Robertson, 4 Civ. Proc. R. (Browne) 112.

—— **Pleading cause of action founded on instrument for payment of money only.** "Where a cause of action, defence, or counterclaim, is founded upon an instrument for the payment of money only, the party may set forth a copy of the instrument, and state that there is due to him thereon, from the adverse party, a specified sum, which he claims. Such an allegation is equivalent to setting forth the instrument, according to its legal effect."[272] Bills of exchange,[273] promissory notes,[274] bonds,[275] policies of insurance,[276] are all included within the term "instruments for the payment of money only"; but a mortgage is not an instrument for the payment of money only.[277] It is not necessary that the instrument set forth should contain an express promise to pay; it is enough that the law would imply a promise upon proof of execution. Thus, an acknowledgment of indebtedness in a specified amount is enough, though not expressing a promise to pay.[278] This provision seems to permit the setting out of a note written in a foreign language though the better practice is to describe it according to the legal effect of the instrument.[279]

This mode of pleading is optional and not mandatory, however.[280] If plaintiff so desires, he may plead the substance of the instrument, i. e., its legal effect. It follows from this that if a copy is set forth, necessary extrinsic facts must be pleaded to the same extent as if the pleading was according to legal effect. Where the liability is conditional and depends upon facts outside of the instrument sued on, such facts must be pleaded.[281] For instance, if demand and notice are

272 Code Civ. Proc. § 534.

273 Andrews v. Astor Bank, 9 Super. Ct. (2 Duer) 629.

274 Keteltas v. Myers, 19 N. Y. 231. And the fact that the note sued on expresses the consideration for the promise to pay, is immaterial. Chase v. Behrman, 10 Daly, 344.

275 Broome v. Taylor, 76 N. Y. 564.

276 Sullivan v. Spring Garden Ins. Co., 34 App. Div. 128.

277 Rose v. Meyer, 7 Civ. Proc. R. (Browne) 219; Peyser v. McCormack, 7 Hun, 300.

278 Burke v. Ashley, 12 Hun, 637.

279 Nourny v. Dubosty, 12 Abb. Pr. 128.

280 City of New York v. Doody, 4 Abb. Pr. 127.

281 Hand v. Shaw, 20 Misc. 698; Frisbee v. Jacobs, 1 City Ct. R., 235; Tooker v. Arnoux, 76 N. Y. 397.

necessary to charge a party to a note or bill, such demand and notice must be stated.[282] So if the instrument may or may not be valid, as where executed by a married woman, and other facts must be shown to give it validity, it is not sufficient merely to set it out without alleging such facts.[283] So title to the paper sued on, if plaintiff is not the payee, must be shown.[284] And where a consideration is not implied, or a request is essential to defendant's liability, it must be specially averred.[285]

—— **Proceedings in libel and slander.** "It is not necessary, in an action for libel or slander, to state, in the complaint, any extrinsic fact, for the purpose of showing the application to the plaintiff, of the defamatory matter; but the plaintiff may state, generally, that it was published or spoken concerning him; and, if that allegation is controverted, the plaintiff must establish it on the trial. In such an action, the defendant may prove mitigating circumstances, notwithstanding that he has pleaded or attempted to prove a justification."[286] The Code herein lays down two rules—one as to the complaint and the other as to the evidence admissible under the answer. As to the complaint, this Code rule applies only to such extrinsic facts as are necessary to show the application but not such as are necessary to show the defamatory meaning of the words.[287] In other words it is not necessary to insert words of innuendo in the complaint except in case the words are harmless unless applied in some way to plaintiff to his injury.[288] The express language of the Code,

[282] Bank of Geneva v. Gulick, 8 How. Pr. 51.
So in action against endorser of note. Corkling v. Gandall, 1 Abb. App. Dec. 423.

[283] Broome v. Taylor, 76 N. Y. 564.

[284] Lord v. Chesebrough, 6 Super. Ct. (4 Sandf.) 696.

[285] Spear v. Downing, 34 Barb. 522; Dolcher v. Fry, 37 Barb. 152.

[286] Code Civ. Proc. § 535; Stokes v. Morning Journal Ass'n, 72 App. Div. 184.

[287] Pike v. Van Wormer, 5 How. Pr. 171. For other like decisions, see 8 Abb. Cyc. Dig. 1055.

[288] Youmans v. Paine, 86 Hun, 479; Hauptner v. White, 80 N. Y. Supp. 896.

i. e., that it was published [or spoken] concerning plaintiff,[289] need not be used. An equivalent statement is sufficient.

The latter part of the Code section, permitting proof of mitigating circumstances, notwithstanding an attempted justification, was intended to soften the rigor of the common law by the rules of which an unsuccessful attempt at justification was regarded as an aggravation of the original wrong enhancing the damages. The rule now seems to be, that when the defendant honestly and in good faith sets up and attempts to prove a justification, but fails, the jury should be charged that such unsuccessful attempt does not enhance the damage, but that if there is an entire failure of proof to sustain the charge, and the jury believe it was inserted maliciously and without probable cause, they may consider that fact on the question of damages.[290]

ART. V. BILL OF PARTICULARS AND COPY OF ACCOUNT.

[289] Jacquelin v. Morning Journal Ass'n, 39 App. Div. 515; Crane v. O'Reilly, 13 Civ. Proc. R. (Browne) 71.

[290] Bishop's Code Practice, in Personal Actions, p. 149; Cruikshank v. Gordon, 118 N. Y. 179.

(A) GENERAL DISTINCTIONS.

§ 800. Copy of account as distinguished from bill of particulars.

A copy of an account is often spoken of by the courts as a bill of particulars but inasmuch as the Code expressly provides for the procedure where the adverse party desires a copy of an "account" relied on in the pleading of his opponent while no provision whatever is made as to the procedure where a bill of particulars of a "claim" is sought,[291] and since the statutory procedure in the one instance and the procedure fixed by the courts in the other instance, are dissimilar, it is submitted that much confusion will be avoided by not calling a copy of an account a bill of particulars and vice versa. In this chapter, therefore, the rules relating to a copy of account and those pertaining to a bill of particulars proper will be separately stated and the term "bill of particulars" will be used in its restricted sense as meaning the particulars of a "claim," as distinguished from the "items of an account" where there is a debit and credit side.

(B) COPY OF ACCOUNT.

§ 801. Demand for copy.

If a party fails to set forth, in a pleading, the items of an

[291] Candee v. Doying, 5 Civ. Proc. R. (Browne) 92; Fullerton v. Gaylord, 30 Super. Ct. (7 Rob.) 551.

account therein alleged, he must deliver to the adverse party, within ten days after a written demand therefor, a copy of the account.[292] It will be noticed that this Code provision applies merely to "items" of an "account." An "account," as the word is herein used, is to be construed according to its ordinary meaning as including almost every claim on contract which consists of several items.[293] It is an account containing "items"[294] but not the items of "damages" sustained.[295] "An account means the entry of debits and credits in a book or on paper; of things bought and sold, of services performed, with date, and price or value. It may be of a single entry or of a great number, and for a short or long period."[296] An account stated which contains items, is an "account"[297] though the word "account" is not limited to accounts stated.[298]

A copy of an account is a matter of right and not of discretion.[299] The Code uses the word "must."

A written demand is necessary to obtain the account. A motion should not be made unless an insufficient copy is served.[300] The demand may be in the following form:

[Title.]

Please take notice, that I hereby demand a copy of the account referred to in the complaint (or answer) in this action.

[Date.] [Signature of attorney.]

[Address.]

[292] Code Civ. Proc. § 531.

[293] Barkley v. Rensselaer & S. R. Co., 27 Hun, 515, 2 Civ. Proc. R. (Browne) 409.

[294] Cunard v. Francklyn, 49 Hun, 233, 15 Civ. Proc. R. (Browne) 134.

[295] Blake v. Harrigan, 19 Civ. Proc. R. (Browne) 207.

[296] Dowdney v. Volkening, 37 Super. Ct. (5 J. & S.) 313.

[297] Keyes v. George C. Flint Co., 69 App. Div. 141; Wells v. Van Aken, 39 Hun, 315; Sanchez v. Dickinson, 47 State Rep. 203.

[298] Barkley v. Rensselaer & S. R. Co., 27 Hun, 515, overruling Johnson v. Mallory, 25 Super. Ct. (2 Rob.) 681.

[299] Badger v. Gilroy, 21 Misc. 466.

[300] When an action or defense is based upon an account, i. e. an entry or entries of items of debit or credit, with dates and prices, or value, a demand for a bill of particulars is proper, and an order for one is unnecessary, except in a case where one furnished on demand is incomplete. Dowdney v. Volkening, 37 Super. Ct. (5 J. & S.) 313.

Within ten days after service of the demand, a copy of the account must be delivered to the attorney of the party making the demand. If the pleader deems himself unable, for any cause, to furnish the items, he should not move to set aside the demand but should serve the best copy possible and then discuss the question of the sufficiency of such bill, or his inability to make it more definite, on a motion for a further account, if the same is made.[301]

§ 802. Sufficiency of copy.

The copy of an account should contain each item, both debit and credit,[302] together with its date,[303] amount,[304] and general character.[305] Thus where, in an action on an account stated, only the aggregate amounts of each party's account was given, a further bill was required so as to give the items of the account.[306]

The copy of the account, if the pleading is verified, must be verified by the affidavit of the party to the effect that he believes it to be true; or, if the facts are within the personal knowledge of the agent or attorney for the party, or the party is not within the county where the attorney resides, or capable of making the affidavit, by the affidavit of the agent or attorney.[307]

Form of copy.

[Title and venue.]
[Copy of account.]
Please take notice that the above is an itemized copy of the account relied on in this action, which is hereby served on you pursuant to your demand of ———.
[Date.] [Signature and address of attorney.]
[Address.]
[Verify if pleading is verified.]

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301 Barkley v. Rensselaer & S. R. Co., 27 Hun, 515, 2 Civ. Proc. R. (Browne) 409.

302 Union Hardware Co. v. Flagler, 8 State Rep. 894, 27 Wkly. Dig. 116.

303 Humphrey v. Cottleyou, 4 Cow. 54.

304 Colwell v. Ludlam, 1 Month. Law Bul. 42; Chandler v. Stevens; 2 Month. Law Bul. 5.

305 Kellogg v. Paine, 8 How. Pr. 329.

306 Wells v. Van Aken, 39 Hun, 315.

307 Code Civ. Proc., § 531.

—— Verification.

X, the plaintiff (or defendant) in the above action, being duly sworn, says that the above copy of account is true to the best of his knowledge and belief.

[Jurat.] [Signature.][308]

§ 803. Procedure where account served is insufficient.

If the account served is deemed insufficient, the party may move for a further account whereupon the question as to the particularity of the items may be decided as well as any excuses the party serving may have for not serving a fuller account.[309] The motion may be made at any time before trial.[310] If the motion is granted, the order should show the points in respect to which a further specification is required.[311] If the pleading is verified, it would seem that a further account should also be verified though the Code makes provision for the verification of only the original account.[312]

§ 804. Effect of failure to serve copy after demand.

Failure to serve an account within ten days after a proper demand therefor, precludes the party from giving evidence of the account.[313] But evidence cannot be excluded if there is an account served, though it be insufficient.[314] While the Code expressly fixes the penalty for failure to comply with the demand i. e., exclusion of evidence, the practice in such a case is to obtain an order at special term, before trial, which will

[308] If the affidavit is by an agent or attorney, state that he believes the copy to be true and that the reason why the affidavit is not made by the party is that the facts are within the personal knowledge of the deponent or that the party is not within the county where the attorney resides, or capable of making the affidavit.

[309] Barkley v. Rensselaer & S. R. Co., 27 Hun, 515, 2 Civ. Proc. R. (Browne) 409; McKinney v. McKinney, 12 How. Pr. 22.

[310] Yates v. Bigelow, 9 How. Pr. 186.

[311] Kellogg v. Paine, 8 How. Pr. 329.

[312] Whithers v. Toulmin, 13 Civ. Proc. R. (Browne) 1.

[313] Code Civ. Proc. § 531.

[314] Schulhoff v. Co-operative Dress Ass'n, 3 Civ. Proc. R. (Browne) 412.

preclude the introduction of any evidence of the account,[315] and it has been held proper to admit the evidence on the trial where no such application has been made.[316] But while proof of the "account" may be prohibited on motion before trial, yet the court has no power to preclude the party from giving other evidence of his cause of action or defense.[317]

(C) BILL OF PARTICULARS.

§ 805. Definition, origin, and purpose.

A bill of particulars is defined as an amplification, or more particular specification, of the matter set forth in the pleading.[318] It is not a part of the pleading.[319] Such a bill was unknown to the ancient common law, and arose out of the use of the common law counts in actions of debt and assumpsit.[320] It was never used in chancery courts.[321]

Its office is merely to limit the generality of the pleading by ascertaining what claims are asserted or demanded so as to prevent surprise, and not to furnish evidence for the opposite party[322] or to enable defendant to impeach or defend claims asserted in the complaint.[323] In other words, the purpose of a bill is to enable the applicant to meet the claim of the opposing party and to reasonably restrict the scope of the inquiry on the trial.[324]

315 Gebhard v. Parker, 120 N. Y. 33; Kellogg v. Paine, 8 How. Pr. 329; Dowdney v. Volkening, 37 Super. Ct. (5 J. & S.) 313.

316 Bartow v. Sidway, 72 Hun, 435, 441.

317 Fischer-Hansen v. Stierngranat, 65 App. Div. 162; Gebhard v. Parker, 120 N. Y. 33.

A pleader, claiming on an account stated, who refuses to furnish the items of his demand, should be precluded from giving evidence of such items further than may be necessary to prove the settlement of the sum due. Goings v. Patten, 1 Daly, 168, 17 Abb. Pr. 339.

318 Starkweather v. Kittle, 17 Wend. 20.

319 Toplitz v. King Bridge Co., 20 Misc. 576.

320 3 Enc. Pl. & Pr. 518.

321 Cornell v. Bostwick, 3 Paige, 160.

322 Fullerton v. Gaylord, 30 Super. Ct. (7 Rob.) 551; Gee v. Chase Mfg. Co., 12 Hun, 630; Morrill v. Kazis, 8 App. Div. 304; Carrie v. Davis, 41 App. Div. 520.

323 People v. Tweed, 5 Hun, 353, 360.

324 Wooster v. Bateman, 4 Misc. 431.

A motion for a bill of particulars is to be distinguished from a motion to make the pleading more definite and certain. The latter remedy is appropriate only where the "nature" of the charge or defense is not apparent. The former remedy is allowable where the "nature" of the charge or defense is apparent, but where it is necessary to a fair trial that the "particulars" of the charge or defense be known to the opposing party before trial.[325]

§ 806. The statute.

After providing specifically for the delivery of a copy of an account sued on, where demanded, the Code winds up the provision with this clause: "The court may, in any case, direct a bill of the particulars of the claim of either party to be delivered to the adverse party."[326] It will be noticed that the "power" to require a bill is unlimited. The court "may," "in any case," direct a bill to be delivered. In other words, whether a party can obtain a bill of particulars depends on the discretion of the trial court.[327]

The word "claim," as used herein, includes not only a ground upon which affirmative relief is asked, but, in case of a defendant, whatever is set up by him based upon facts alleged, as the reason why judgment should not go against him. This "power" extends to all kinds of actions and to all pleadings, irrespective of whether interposed by plaintiff or defendant.[328]

§ 807. When required.

Difficulty is encountered when an attempt is made to lay

[325] Tilton v. Beecher, 59 N. Y. 176; Dumar v. Witherbee Sherman Co., 84 N. Y. Supp. 669.

[326] Code Civ. Proc. § 531.

[327] Van Olinda v. Hall, 82 Hun, 357, 64 State Rep. 94; Keteltas v. Gilmour, 10 Misc. 788, 63 State Rep. 305.

[328] Dwight v. Germania Life Ins. Co., 84 N. Y. 493.

The particulars of a mere defense may be required (Kelsey v. Sargent, 100 N. Y. 602), although the answer also sets up a general release. Diossy v. Rust, 46 Super. Ct. (14 J. & S.) 374.

But ordinarily where a defense is pleaded, a bill of particulars will not be required of defendant. Barone v. O'Leary, 44 App. Div. 418.

A bill will not be required as to the defense of the statute of limitations. Rosenstock v. Dessar, 40 App. Div. 620, 58 N. Y. Supp. 145.

down general rules as to when the court, in the exercise of its discretion, will grant the remedy. In a leading case, the court of appeals say that "a bill of particulars is appropriate in all descriptions of actions where the circumstances are such that justice demands that a party should be apprised of the matters for which he is to be put for trial with greater particularity than is required by the rules of pleading."[329] The discretion should be prudently employed, with a view to enable parties to prepare their pleadings and evidence for the trial of the real issues involved, but not to impose unnecessary labor or expense on any party.[330] A bill should not be required when unnecessary. Thus, if the motion is made to enable defendant to plead, and the affidavit made by the attorney for defendant, states that defendant has fully stated his case to deponent and that the latter has advised him that he has a good defense on the merits, the bill should be refused as unnecessary.[331]

Without going into detail, it is believed that the following propositions are recognized by nearly all the courts of this state:

1. Where the information sought for lies peculiarly within the knowledge of the applicant or for aught that appears the applicant is as well acquainted with the nature of the particulars of the claim as is the pleader, a bill will not generally be required.[332] For instance, where the information sought for is contained in books in the possession of the applicant, the bill will not be required;[333] but mere familiarity with the details of the transaction does not necessarily preclude the granting of the order.[334] And it is no answer to a motion for a bill that all the particulars are more intimately within the knowledge of the moving party than within that of the pleader,

329 Tilton v. Beecher, 59 N. Y. 176.

330 Butler v. Mann, 9 Abb. N. C. 49.

331 Wolff v. Kaufman, 65 App. Div. 29.

332 Powers v. Hughes, 39 Super. Ct. (7 J. & S.) 482; Fink v. Jetter, 38 Hun, 163; Werner v. Franklin Nat. Bank, 40 App. Div. 485; Passavant v. Sickle, 14 Civ. Proc. R. (Browne) 57; Blackie v. Neilson, 19 Super. Ct. (6 Bosw.) 681; Butler v. Mann, 9 Abb. N. C. 49.

333 Cohn v. Baldwin, 74 Hun, 346, 56 State Rep. 379; Passavant v. Cantor, 21 Abb. N. C. 259, 48 Hun, 546.

334 Wooster v. Bateman, 4 Misc. 431, 53 State Rep. 562.

where the moving party, in his pleading, has denied the facts alleged.[335] So the fact that the information sought to be obtained must be within the knowledge of the moving party does not preclude the granting of the order, where the pleading involves a large number of transactions.[336]

2. The evidence which the pleader expects to produce to support the facts relied on, will not be required to be disclosed.[337] So a party will not ordinarily be required to furnish the names of the witnesses by whom he proposes to establish his case.[338]

3. A party should not be required to make specification of matters which from their inherent character are not capable of exactitude.[339]

4. A bill will generally not be required as to immaterial or unnecessary matter[340] or matter of inducement.[341]

5. If an answer contains merely denials,[342] or denials and admissions,[343] defendant will not ordinarily be required to furnish a bill of particulars.

335 Wood v. Gledhill, 20 Civ. Proc. R. (Browne) 155.

336 Roberts v. Safety Buggy Co., 1 App. Div. 74.

337 Morrill v. Kazis, 8 App. Div. 304; Jewelers' Mercantile Agency v. Jewelers' Weekly Pub. Co., 66 Hun, 38, 49 State Rep. 502; Passavant v. Sickle, 14 Civ. Proc. R. (Browne) 57.

338 Wales Mfg. Co. v. Lazzaro, 18 Misc. 352, 75 State Rep. 1513; Caziarc v. Abram French Co., 91 Hun, 641, 36 N. Y. Supp. 971, 72 State Rep. 77; Kersh v. Rome, W. & O. R. Co., 14 Civ. Proc. R. (Browne) 167.

But while the name of a witness as such, may not be required to be disclosed, yet the name of an individual with whom it is claimed that the transaction which is one of the issues in the case was had may, in a proper case, be required to be specified, even though it may be the intention of the opposite party to prove the fact by such individual as a witness. Taylor v. Security Mut. Life. Ins. Co., 73 App. Div. 319.

339 Passavant v. Sickle, 14 Civ. Proc. R. (Browne) 57.

340 Solomon v. McKay, 49 Super. Ct. (17 J. & S.) 138.

But explanatory notes set up in addition to a denial, though unnecessary, may be the subject of a bill. Cunard v. Francklyn, 111 N. Y. 511, 19 State Rep. 641, 16 Civ. Proc. R. (Browne) 59.

341 Fullerton v. Gaylord, 30 Super. Ct. (7 Rob.) 551.

342 Gray v. Shepard, 36 State Rep. 610, 59 Hun, 622, 13 N. Y. Supp. 27; Bainbridge v. Friedlander, 7 Misc. 227, 58 State Rep. 22.

343 King v. Ross, 21 App Div. 475.

6. An absolute denial does not preclude the party from demanding a bill.[344]

§ 808. Illustrations of when awarded in specific actions and in relation to specific matters.

Having stated the general rules which the courts have laid down as a guide to determine when a bill of particulars will be required, brief reference will now be made to the actions and issues in regard to which a bill has been required.[345]

—— **Actions ex contractu in general.** Examples of actions ex contractu in which a bill has been required are very numerous, but a few of the causes of action which are very frequently before the courts and in which a bill is usually required, will be noticed. In an action for services rendered during a prolonged period of time where there is no express contract, a bill of particulars will generally be ordered,[346] as where a physician or attorney sues for services,[347] but if the action is to recover a sum fixed by contract for definite services, a bill will not usually be required.[348] The bill may be denied where the action is for a specific sum and the contract sued on is set out in the complaint;[349] but the plaintiff in an action on a quantum meruit is entitled to a bill of particulars as to time, place, amounts, etc., of a special contract set up in defense.[350]

[344] Rice v. Rockefeller, 14 Civ. Proc. R. (Browne) 303; Justum v. Bricklayers', Plasterers' & Stonemasons' Union, 78 Hun, 503, 61 State Rep. 163.

[345] For a complete collection of the New York decisions as to bills of particulars, see 2 Abb. Cyc. Dig. 507.

[346] McLaughlin v. Kelly, 22 Abb. N. C. 286; Treadnell v. Green, 84 N. Y. Supp. 354.

[347] Dempsey v. Bergen County Traction Co., 74 App. Div. 474; Nash v. Spann, 13 App. Div. 226; Corbett v. Trowbridge, 2 Wkly. Dig. 255. But where an action was brought by attorneys for services in a single action, and it had been referred, and the affidavits showed the nature of the services, it was held proper to deny a motion for a bill of particulars. Mellen v. Mellen, 43 State Rep. 801, 63 Hun, 631, 22 Civ. Proc. R. (Browne) 39.

[348] Ives v. Shaw, 31 How. Pr. 54; Stilwell v. Hernandez, 7 Daly, 485; White v. West, 27 Misc. 397.

[349] Mertage v. Bennett, 59 Super. Ct. (27 J. & S.) 572; Hoey v. National Shoe & Leather Bank, 33 App. Div. 543.

[350] Murray v. Mabie, 55 Hun, 38.

The manner in which a contract was made, the manner of its execution, and the details of particular work alleged to have been done, are not ordinarily subjects of bills of particulars.[351] And where there is a denial of plaintiff's performance of the contract, it is not proper to compel defendant to furnish a bill of particulars as to the respects in which he claims that the contract was not performed, as it is the duty of plaintiff to prove affirmatively the completed performance.[352] But if an answer alleges that the work sued for was done improperly, carelessly, and in an unworkmanlike manner, a bill will be required.[353] In an action on a policy, the particulars as to the property injured may be required,[354] but will not be ordered on an allegation of total loss;[355] and, on an allegation of breach of warranty in an action on a life policy, matters relating to the bodily condition at the time of the application may ordinarily be required.[356]

A bill of particulars has been allowed in a suit to enforce specific performance of a contract.[357]

Where only "general" damages are sought, a bill relating thereto will not ordinarily be required.[358]

——**Actions ex delicto.** A bill of particulars may be ordered in an action based on a tort. But in so far as items of

[351] Niemoller v. Duncombe, 33 App. Div. 536.

[352] Goddard v. Pardee Medicine Co., 52 Hun, 85, 22 State Rep. 540, 16 Civ. Proc. R. (Browne) 379; Strebell v. J. H. Furber Co., 2 Misc. 450, 51 State Rep. 163.

[353] Cunningham v. Massena Springs & F. C. R. Co., 16 Civ. Proc. R. (Browne) 244.

[354] Cockroft v. Atlantic Mut. Ins. Co., 22 Super. Ct. (9 Bosw.) 681.

[355] Osborne v. New York Mut. Ins. Co., 26 Wkly. Dig. 111.

[356] Taylor v. Security Mut. Life Ins. Co., 73 App. Div. 319; Dwight v. Germania Life Ins. Co., 84 N. Y. 493, 22 Hun, 167; Richter v. Equitable Life Assur. Soc., 22 App. Div. 75.

[357] Where a complaint, in an action for specific performance of a contract, also alleges damages arising from plaintiff's inability to carry out contracts entered into in reliance on the defendant's undertaking, it is proper for the court to award the defendant a bill of particulars of such contracts and enterprises, and the profits expected therefrom. United States Land Inv. Co. v. Mercantile Trust Co., 54 Hun, 417, 27 State Rep. 187.

[358] Bolognesi v. Hirzel, 58 App. Div. 530; Commercial Nat. Bank v. Hand, 9 App. Div. 614.

damages are concerned, a bill may be required only as to "special" damages.[359] In a negligence case,[360] the court often orders a bill of particulars of the time, place and nature of the negligent acts,[361] the dangerous condition of the premises or machinery,[362] or the permanent bodily injuries received.[363]

[359] Bell v. Heatherton, 66 App. Div. 603; Roberts v. Safety Buggy Co., 1 App. Div. 74; Post Express Printing Co. v. Adams, 24 Abb. N. C. 24f, 55 Hun, 35.

[360] Myers v. Albany Ry. Co., 5 App. Div. 596.

But it has been held that great caution should be exercised by the courts in requiring parties to furnish particulars in actions for negligence. It is usually impossible for a plaintiff to know with any degree of precision what his proof will be, and the bill of particulars would in most cases of that character be an instrument of embarrassment and injustice. Muller v. Bush & Denslow Mfg. Co., 15 Abb. N. C. 88.

In an action to recover damages for the death of plaintiff's intestate, where the complaint alleges that defendant company wrongfully and negligently failed to provide the deceased with competent, temperate co-employes, a bill of particulars may be required indicating by name or by the position which they held at the time of the accident, the employes whose competency plaintiff proposes to question. Field v. New York Cent. & H. R. R. Co., 35 Misc. 111.

Instances of where bill refused, see Phalen v. Roberts, 21 App. Div. 603; Manning v. International Nav. Co., 24 App. Div. 143; Donohue v. Meares, 47 State Rep. 188.

[361] Kersh v. Rome, W. & O. R. Co., 14 Civ. Proc. R. (Browne) 167.

[362] King v. Brookfield, 72 App. Div. 483; O'Hara v. Ehrich, 32 State Rep. 118, 19 Civ. Proc. R. (Browne) 72; Loeber v. Roberts, 58 Super. Ct. (26 J. & S.) 582; O'Leary v. Candee, 60 N. Y. Supp. 1103; Daly v. Bloomingdale, 71 App. Div. 563.

[363] Mueller v. Tenth & Twenty-third St. Ferry Co., 38 App. Div. 622, 56 N. Y. Supp. 310; Cavanagh v. Metropolitan St. Ry. Co., 70 App. Div. 1; O'Neill v. Interurban St. Ry. Co., 84 N. Y. Supp. 505.

Nature and location of permanent injuries. Curtin v. Metropolitan St. Ry. Co., 65 App. Div. 610, 72 N. Y. Supp. 580.

But see Steinau v. Metropolitan St. Ry. Co., 63 App. Div. 126; English v. Westchester Electric Ry. Co., 69 App. Div. 576.

In a personal injury case a bill of particulars may be required containing an itemized statement of the expense that plaintiff was put to for medical and surgical appliances, and stating the number of weeks plaintiff was confined to her bed, but plaintiff should not be compelled to furnish defendant with the names and addresses of the physicians and the number of visits. Steinau v. Metropolitan St. Ry. Co., 63 App. Div. 126.

So a bill is often required in actions for libel[364] or slander,[365] actions for malicious prosecution,[366] action for seduction,[367] actions for criminal conversation,[368] actions for alienation of affections,[369] actions for conversion,[370] and actions for conspir-

[364] Wynkoop, Hallenbeck, Crawford Co. v. Albany Evening Union Co., 26 App. Div. 623, 49 N. Y. Supp. 662.

It is well settled that a defendant may be compelled to give a bill of particulars of the matters set up as a defense in an action for libel. Tallmadge v. Press Pub. Co., 28 State Rep. 396, 55 Hun, 605, 7 N. Y. Supp. 895. So of matter pleaded in justification. Ball v. Evening Post Pub. Co., 38 Hun, 11.

Where special damages are sought in a libel suit the particulars relating to such damages must be stated, and where the diversion of trade and intimidation of customers is charged names and addresses must be given. Jacobs v. Water Overflow Preventive Co., 72 Hun, 637, 25 N. Y. Supp. 346, 55 State Rep. 435. But a bill of the general damages will not be required. Bell v. Heatherton, 66 App. Div. 603.

[365] Mason v. Clark, 75 App. Div. 460; Rowe v. Washburne, 62 App. Div. 131; Dempewolf v. Hills, 53 Super. Ct. (21 J. & S.) 105.

[366] Where the complaint in an action for malicious prosecution alleged publication of the prosecution on the procurement of defendants, and that in consequence of his arrest and imprisonment and malicious prosecution many persons have refused to do business or trade with him, defendants were entitled to a bill of particulars specifying the newspapers which plaintiff claimed made the publication on the procurement of defendants, and the names of the persons who refused to do business with him. Dietz v. Leber, 33 App. Div. 563. But a bill of particulars of the persons refusing credit to plaintiff, ceasing to deal with him, etc., was refused in Lane v. Williams, 37 Hun, 388.

[367] Schwartz v. Green, 38 State Rep. 569, 20 Civ. Proc. R. (Browne) 431 (particulars of answer).

[368] Tilton v. Beecher, 59 N. Y. 176; Shaffer v. Holm, 28 Hun, 264; Wood v. Gledhill, 20 Civ. Proc. R. (Browne) 155.

[369] A bill of particulars is proper upon a complaint which alleges that defendant alienated the affections of plaintiff's wife by means of "gifts, presents, promises, threats, and seductive and deceitful arts and wiles."—Wood v. Gledhill, 35 State Rep. 597, 20 Civ. Proc. R. (Browne) 155, 12 N. Y. Supp. 764.

But a bill of particulars has been refused in actions for alienation of affections (Kirby v. Kirby, 34 App. Div. 25) where its effect would be merely to disclose plaintiff's evidence.

[370] Robinson v. Comer, 13 Hun, 291; Allen v. Stead, 33 State Rep. 878; Cunard v. Francklyn, 47 Hun, 526 (particulars of answer).

acy.[371] So a bill of particulars is often allowed in an action where fraud or false representations is an issue.[372]

—— **Actions based on statute.** A bill has been required in actions based on a statute as where the action is to recover a penalty imposed by statute.[373]

—— **Actions relating to real property.** A bill has been required in actions of ejectment,[374] partition,[375] and for dower.[376]

—— **Actions of replevin.** A bill of particulars has been allowed in an action of replevin.[377]

[371] Ricker v. Erlanger, 84 N. Y. Supp. 69; Potter v. United States Nat. Bank, 51 State Rep. 913, 67 Hun, 652, 22 N. Y. Supp. 453.

In an action for damages for conspiring to withhold evidence in a previous action, the defendant may have a bill of particulars setting forth specifically the evidence withheld or concealed, if oral, the names and residences of the witnesses who would or should have testified; if documentary, the documents claimed to have been suppressed. Leigh v. Atwater, 2 Abb. N. C. 419.

For case in which it was held proper to refuse bill, see Higenbotam v. Green, 25 Hun, 214.

[372] A bill is often required in an action to set aside as fraudulent an assignment for benefit of creditors. Claflin v. Smith, 13 Abb. N. C. 205; Gas-Works Const. Co. v. Standard Gas-Light Co., 47 Hun, 255.

Particulars of fraud or false representations alleged to have induced execution of written instrument, ordered. H. B. Claflin Co. v. Knapp, 60 App. Div. 9.

In an action for false representations in inducing a sale from the plaintiff and for circulating rumors to keep away purchasers, defendants were entitled to a bill of particulars. Williams v. Folsom, 37 State Rep. 635, 59 Hun, 626, 13 N. Y. Supp. 712.

For further cases, see 2 Abb. Cyc. Dig. 526-528.

[373] Kee v. McSweeney, 66 How. Pr. 447.

[374] Stevens v. Webb, 4 Civ. Proc. R. (Browne) 64; Roberts v. Cullen, 40 State Rep. 672, 16 N. Y. Supp. 517.

[375] Crossman v. Wyckoff, 32 App. Div. 32; Drake v. Drake, 31 Misc. 8.

[376] If answer denies marriage, bill may be ordered as time, place and circumstances of marriage. Clark v. Society of St. James' Church, 21 Hun, 95; Govin v. De Miranda, 87 Hun, 227.

[377] In an action to recover six masquerade suits, it was held proper to require a bill of particulars giving the number, description and value of the articles, but not to require the names and residences of the person to whom each suit was delivered so far as plaintiff was able. Ottman v. Griffin, 53 Hun, 164, 17 Civ. Proc. R. (Browne) 184.

—— **Actions for divorce.** A bill of particulars is often granted in an action for a divorce, as by requiring a bill specifying the time, place and parties, where adultery is alleged.[378]

—— **Action on an account stated.** The court has ample power to order a bill of particulars in an action simply and purely upon an account stated, and often does if the moving papers disclose such a condition of affairs as will force the conclusion that that is the best way to reach exact justice between the parties.[379]

—— **Actions to try title to office.** A bill of particulars may be ordered in an action to try title to an office.[380]

§ 809. Application for order.

The usual practice is for the attorney to supply his adversary with the particulars upon request being made, but, where he neglects or declines so to do, the party desiring to avail himself of the absence of the bill must obtain, at special term, by motion, on notice, an order for the particulars.[381] The mo-

[378] Hunter v. Hunter, 38 Misc. 672; Kelly v. Kelly, 12 Misc. 457.

When a bill of particulars will be ordered as to the details of the marriage. Bullock v. Bullock, 85 Hun, 373.

When bill of particulars in action for divorce on ground of adultery will be ordered. Mitchell v. Mitchell, 61 N. Y. 398; Cardwell v. Cardwell, 12 Hun, 92.

For instances where bill refused, see De Carrillo v. De Carrillo, 53 Hun, 359; Carpenter v. Carpenter, 42 State Rep. 577; Oviatt v. Oviatt, 14 Misc. 127; Gridley v. Gridley, 7 Civ. Proc. R. (Browne) 215; Krauss v. Krauss, 73 App. Div. 509.

[379] Duffy v. Ryer, 43 State Rep. 796; Wells v. Van Aken, 39 Hun, 315. Where error is alleged in an account stated, and the omission of the claim is made the basis of an action, the plaintiff is entitled to a bill of particulars of the errors in the account. Coit v. Goodhart, 5 App. Div. 444.

[380] A bill of particulars may be ordered in an action to try the title to office turning on the question which candidate had the greatest number of votes. People ex rel. Swinburne v. Nolan, 10 Abb. N. C. 471; Jacobs v. Friedman, 28 Misc. 441; Fischer-Hansen v. Stiernagranat, 65 App. Div. 162.

[381] West v. Brewster, 8 Super. Ct. (1 Duer) 647; Clegg v. American Newspaper Union, 7 Abb. N. C. 59.

Formerly it was the practice to procure an ex parte order in the alternative directing the party to furnish a bill of particulars or to show cause. Brewster v. Sackett, 1 Cow. 571.

tion may be in the alternative for a bill of particulars or that the pleading be made more definite and certain.[382] This motion must be supported by an affidavit[383] except in an action on an account, in which case it may be based on the pleadings.[384] The affidavit should be made by the party, except where it is practically impossible for the party to make it, in which case it seems that it may be made by an agent or the attorney,[385] but if an agent or the attorney makes the affidavit, it is necessary that it show why it was not made by the party and the source of deponent's information;[386] and it is not a sufficient excuse that defendant is a foreign corporation and that all of its officers reside without the state,[387] or that the party is absent from the county where the attorney resides,[388] or that there was not time before making the motion to procure the affidavit of the party.[389]

The motion must be made before trial,[390] but it may be made

[382] But it should be remembered that motion to make more definite and certain can be made only before pleading. Gridley v. Gridley, 7 Civ. Proc. R. (Browne) 215.

[383] Willis v. Bailey, 19 Johns. 268.

[384] Badger v. Gilroy, 21 Misc. 466; Webster v. Fitchburg R. Co., 32 Misc. 442.

[385] Van Olinda v. Hall, 82 Hun, 357; Gridley v. Gridley, 7 Civ. Proc. R. (Browne) 215; Hoeninghaus v. Chaleyer, 22 State Rep. 528; Gallerstein v. Manhattan Ry. Co., 27 Misc. 506.

There is authority, however, that any person cognizant of the facts may make the affidavit. Sanders v. Soutter, 54 Hun, 310; Ward v. Littlejohn, 17 Civ. Proc. R. (Browne) 178.

[386] Blake v. Harrigan, 33 State Rep. 210, 19 Civ. Proc. R. (Browne) 207; Mayer v. Mayer, 29 App. Div. 393; Jacobs v. Friedman, 28 Misc. 441.

[387] Dueber Watch Case Mfg. Co. v. Keystone Watch Case Co., 50 State Rep. 417, 23 Civ. Proc. R. (Browne) 44; Mungall v. Bursley, 51 App. Div. 380.

[388] Cohn v. Baldwin, 74 Hun, 346, 56 State Rep. 379; Wolff v. Kaufman, 65 App. Div. 29.

[389] Toomey v. Whitney, 80 N. Y. Supp. 826.

[390] The taking of a deposition by consent is not the beginning of a trial within the rule limiting the time to move for a bill of particulars. McLaughlin v. Kelly, 22 Abb. N. C. 286.

An early case held that defendant might obtain the order before appearance. Roosevelt v. Gardinier, 2 Cow. 463.

Whether the court may order a bill of particulars after a refer-

either before or after pleading, though if it is made before pleading, the affidavit must show that a bill of particulars is necessary to enable the moving party to plead,[391] while if it is made after pleading and after issue joined, it is necessary to show that the particulars are necessary to enable the party to prepare for trial.[392] The mere fact that the motion has been denied before pleading, does not of necessity preclude the granting of a motion after joinder of issue,[393] as the motion is sometimes refused before answer though it would be granted after issue joined, to prevent surprise at the trial.[394] On the other hand, a party may be entitled to a bill of particulars to enable him to plead, though a motion to prepare for trial would be denied as premature.[395] If a bill of particulars is obtained by order before the moving party pleads, he cannot obtain another order after pleading, where he does not claim that the bill served was defective.[396] And where a motion for a bill of particulars has been made as to any part of a pleading, and such motion has been denied, the party cannot make another motion at the same stage of the action in reference to a bill of particulars as to another part of the same pleading, without leave of the court. The mere fact that different causes of action are set out in the complaint does not entitle the party to

ence of the issues is a matter of doubt, but in any event it will not be exercised to interrupt a trial actually proceeding before the referee, especially where plaintiff is attending as a witness on his own behalf.

Cadwell v. Goodenough, 25 Super. Ct. (2 Rob.) 706, 28 How. Pr. 479.

391 Watertown Paper Co. v. West, 3 App. Div. 451, 73 State Rep. 846; Haggerty v. Ryan, 17 Misc. 277; American Credit Indemnity Co. v. Bondy, 17 App. Div. 328; Saalfield v. Cutting, 25 Misc. 661.

An application for a bill made before answer will be denied where it appears that all the defendant needs to allege in order to set up his defense is a general denial of the allegations of the complaint. Bullock v. Bullock, 85 Hun, 373.

392 Haggerty v. Ryan, 17 Misc. 277.

393 Bullock v. Bullock, 85 Hun, 373; Beneville v. Church of St. Bridget, 2 Month. Law Bul. 5; Saalfield v. Cutting, 25 Misc. 661.

394 Constable v. Hardenbergh, 76 Hun, 434; Govin v. De Miranda, 87 Hun, 227, 67 State Rep. 426, 33 N. Y. Supp. 753.

395 Nash v. Spann, 13 App. Div. 226.

396 Boughton v. Scott, 36 Misc. 838.

make separate and distinct motions in reference to each portion of the complaint relating to the different causes of action.[397]

Laches in moving is not necessarily fatal, though the court will take into consideration the fact that the application has not been made at the first opportunity,[398] but if no delay in the action is caused thereby, the motion will usually be granted where otherwise proper.[399] It has been held that a delay of several terms after the cause has been put on the calendar is not necessarily fatal[400] nor is failure to move until the day set for trial,[401] especially where a bill of particulars was demanded soon after the action was brought.[402] The delay may be excused by the pendency of negotiations for settlement.[403]

—— **Sufficiency of affidavits.** The affidavit should set out the facts making the bill necessary.[404] It should state the condition of the cause, so as to show whether the application is to enable the party to plead or to prepare for trial, and briefly state the cause of action or defense as to which the particulars are sought, the ignorance of the deponent as to the particulars of the claim and that the particulars are necessary to enable the moving party either to plead or to prepare for trial,[405] that the

[397] Klumpp v. Gardner, 44 Hun, 515.

[398] Vanderzee v. Hallenbeck, 14 State Rep. 447, 14 Civ. Proc. R. (Browne) 99; Masterson v. City of New York, 4 Civ. Proc. R. (Browne) 317.

[399] Smith v. Johnston, 22 State Rep. 593, 52 Hun, 611, 5 N. Y. Supp. 128.

[400] Klock v. Brennan, 35 State Rep. 745, 20 Civ. Proc. R. (Browne) 139, 13 N. Y. Supp. 171.

[401] Winchell v. Martin, 14 Wkly. Dig. 458.

[402] Shaffer v. Holm, 28 Hun, 264, 3 Civ. Proc. R. (Browne) 81.

[403] Justum v. Bricklayers', Plasterers' & Stonemasons' Union, 78 Hun, 503, 61 State Rep. 163, 29 N. Y. Supp. 621.

[404] Constable v. Hardenbergh, 76 Hun, 434, 59 State Rep. 318; Talmadge v. Sanitary Security Co., 2 App. Div. 43; Slingerland v. International Contracting Co., 28 Misc. 319.

[405] Wales Mfg. Co. v. Lazzaro, 19 Misc. 477; Mungall v. Bursley, 51 App. Div. 380. A mere allegation that the applicant is ignorant of the particulars sought and that a bill is necessary and material, is insufficient. Dorgan v. Scheer, 31 Misc. 801.

When made by a corporate officer should show not only that he has no knowledge or information as to the items desired, but also

party intends in good faith to contest the cause of action or defense, that a previous demand for a bill has been made, if the moving party desires to obtain costs, that no previous application to the court for a bill has been made, if an order to show cause is sought, and that the party has a good defense on the merits, if the moving party is the defendant and he desires an extension of time to answer. The affidavit in an action of tort should allege that the party cannot form an opinion as to the matters with which he is charged, and that the charge is so vague that he does not know what he is charged with,[406] and that he is not guilty of the offense or offenses charged in the complaint.[407] It is not sufficient for an attorney to make affidavit that certain facts are not within the knowledge of his client.[408] An affidavit of merits in the moving papers of a defendant has been held to preclude the granting of an order for a bill to enable defendant to plead, on the ground that such affidavit of merits showed that defendant had sufficient knowledge to plead.[409]

Counter affidavits may be introduced to show that the moving party is not ignorant of the particulars sought,[410] or that the pleader is unable to furnish the particulars sought,[411] or that the application is not made in good faith but for the purpose of delaying the action. But counter affidavits should not ordinarily set up that no bill can be made out as it is the duty

the ignorance of the other officers. Sidney B. Bowman Cycle Co. v. Dyer, 23 Misc. 620.

But affidavits which state an ignorance as to what incidents are referred to as a defense in the pleading, are sufficient although they do not state an ignorance of any such incidents. Dwight v. Germania Life Ins. Co., 84 N. Y. 493.

406 Orvis v. Dane, 1 Abb. N. C. 268; Orvis v. Jennings, 6 Daly, 434.

407 Gridley v. Gridley, 7 Civ. Proc. R. (Browne) 215.

408 Stevens v. Smith, 38 App. Div. 119; Toomey v. Whitney, 80 N. Y. Supp. 826.

409 Wolff v. Kaufman, 65 App. Div. 29.

410 But it is no answer to the application to say that the plaintiff knows the facts as well as the defendant, as the parties are at issue upon the facts and the plaintiff seeks information not as to what the facts are, but as to what facts the defendant will attempt to establish. Murray v. Mabie, 55 Hun, 38, 28 State Rep. 308.

411 Carrie v. Davis, 41 App. Div. 520.

of the party to furnish the best possible bill of particulars and then excuse himself for any insufficiency therein if a motion is made for a more specific bill.[412]

—— Form of affidavit.

[Title and venue.]

X, being duly sworn, says:

I. That he is (the plaintiff or defendant or agent or attorney of plaintiff or defendant) in the above entitled action.

II. [If deponent is agent or attorney state] That the reason why this affidavit is not made by plaintiff (or defendant) is * * *.

III. That the complaint in the above action was served on * * *, and (if defendant has answered) that defendant served his answer on * * * so that the cause is at issue (or that plaintiff served his reply on * * *).

IV. That the cause of action (or defense or counterclaim) relied on by plaintiff (or defendant) is, in substance, as follows: * * *.

V. [If made by defendant.] That defendant intends in good faith to defend this action.[413]

VI. That deponent is without information or the means of information as to * * *,[414] and that in order to enable him to properly answer (or reply),[415] it is necessary that * * * be furnished with a bill of particulars as to such facts.

VII. [If order to show cause is asked for] That no previous application, etc.

VIII. [If extension of time to plead is sought, add affidavit of merits.]

[Jurat.] Signature.]

§ 810. Decision of the motion.

Whether the court shall grant or deny the motion rests wholly in its discretion. It may permit a withdrawal of the portion of the pleading concerning which particulars are sought, and then deny the motion.[416] The motion may be defeated by the

[412] Schwartz v. Green, 38 State Rep. 569; City of Rochester v. McDowell, 35 State Rep. 538, 12 N. Y. Supp. 414.

[413] If action is based on tort, add "and that he has a good defense on the merits, as he is advised by * * *, his counsel, and verily believes."

[414] Insert particulars sought.

See form in Gardinier v. Knox, 27 Hun, 500.

[415] If motion is made after pleading substitute "that in order to enable * * * to prepare for trial and to prevent surprise at the trial."

[416] Lambert v. Perry, 15 State Rep. 964; Rosenbaum v. Fire Ins. Ass'n of England, 16 Wkly. Dig. 548; Dyett v. Seymour, 8 State Rep.

service of an amended pleading as of course within twenty days and before the hearing of the motion,[417] or, it would seem, by denying any intention to rely on matters as to which information is sought.[418] The bill should not be ordered where it is impossible for the party to comply with the order,[419] and the inability of the party to comply as fully as required may be shown in the bill served.[420]

§ 811. Order.

The order should direct a time when the bill of particulars is to be furnished, and should specify the facts, the particulars of which are required.[421] It may stay proceedings until the bill is furnished,[422] allow the moving party an additional number of days not to exceed twenty in which to answer or reply, and impose the costs of the motion, if a previous demand for a bill has been made and disregarded. The order may also contain a provision as to the penalty for disobedience[423] as that if a bill of particulars is not served within a specified number of days, the pleader shall be precluded from giving evidence at the trial in support of the facts as to which particulars are sought.[424] The scope of the order is ordinarily a question of discretion,

429, 26 Wkly. Dig. 294. But see Weiler v. Mooney, 27 Wkly. Dig. 79, where order was granted notwithstanding such offer.

417 Callahan v. Gilman, 11 App. Div. 522.

But the amended complaint must be full and complete as to the matters as to which a bill is sought. Hanser v. Luther, 36 Misc. 730.

418 Ketcham v. Ketcham, 32 App. Div. 26.

419 Mosheim v. Pawn, 44 State Rep. 792; United Bldg. & Loan Bank v. Bartlett, 2 Misc. 479, 51 State Rep. 159.

420 City of Rochester v. McDowell, 35 State Rep. 538, 59 Hun, 615, 12 N. Y. Supp. 414.

421 Hubbard v. Otis, 17 Wkly. Dig. 348.

422 Jacobs v. Friedman, 28 Misc. 441.

423 Dwight v. Germania Life Ins. Co., 84 N. Y. 505.

424 But the order is too broad where it fixes as a penalty that the party "be precluded from giving evidence at the trial" in support of his pleading. Mason v. Clark, 75 App. Div. 460; Baltimore Mach. Works v. McKelvey, 71 App. Div. 340.

And furthermore the provision may be modified where the bill of particulars served shows inability to specify certain facts more particularly than as set out in the pleading. Cruikshank v. Cruikshank, 30 App. Div. 381.

depending on the circumstances,[425] but it should require the bill to be verified if the pleadings in the cause are verified, unless the case is an exceptional one.[426] It may require the moving parties to submit their books of account for inspection, in order to enable the bill of particulars to be framed.[427] It would seem that an order for a bill to "prepare for trial" will not be granted in pursuance of a motion for a bill to enable the applicant to "plead."[428] A motion to vacate the order must be made before the time to appeal therefrom has expired.[429]

—— Form of order.

[Title.]

[Name of court.]

On reading the annexed affidavits and on the pleadings (or particular pleadings) in this action, and on motion of * * *, attorney for * * *:

Ordered, that the * * * herein deliver to the * * * herein, before ——— day of ———, a bill of particulars as to * * *.[430] It is further ordered that on the trial of this action the * * * be precluded from giving evidence of any matter respecting * * * beyond that which he may specify in the bill of particulars above ordered;[431] and it is further ordered that the proceedings in this action

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[425] Witkowski v. Paramore, 93 N. Y. 467.

[426] Manning v. Benedict, 31 App. Div. 51.

[427] Allen v. Stead, 33 State Rep. 878, 11 N. Y. Supp. 536.

[428] McClellan v. Duncombe, 26 App. Div. 353.

[429] Brown v. Thorley, 30 Misc. 809.

[430] Here insert in full the facts as to which particulars are required and what particulars are to be furnished.

The following is the ordering part of an order granted in Higenbotam v. Green, 25 Hun, 214, where the particulars sought were as to the sanity of plaintiff:

"I. A bill of the particulars of the 'plaintiff's actions, conduct and habits,' upon which the opinions of the defendants * * * respecting the sanity or mental condition of the plaintiff, mentioned or referred to in the eighth paragraph of the answer of the said defendants * * * as having been observed by them respectively, were respectively based, formed, or founded.

II. It is further ordered that said bills of particulars respectively specify the time and place when and where the acts or actions of the plaintiff so referred to in the respective answers of * * * occurred.

That said bills of particulars also respectively specify what such acts or actions were, and when and where the observations referred to in said answers of * * * were made and what was observed."

[431] Other penalties may be inserted, if desired.

on the part of * * * be stayed until compliance with this order, and that * * * days' further time be given * * * in which to answer (or reply) after the ——— day of ———.

§ 812. Contents of bill of particulars.

The bill of particulars need not be in any particular form, but it is sufficient if it fairly apprises the opposing party of the nature of the claim, so that there can be no surprise.[432] It should fully comply with the order so far as possible and where the party cannot give the details or cannot give them with sufficient particularity, he should state in the bill the reason why he cannot fully comply with the order. It need not specify the parties to the suit[433] nor the particulars of the cause of action or defense of the adverse party.[434] Whether the bill is sufficient should, it seems, be determined on inspection of the notice of motion or order to show cause as well as upon the order requiring service of a bill.[435] If the defects in the bill are not pointed out, an objection to evidence will not be sustained on the ground that a proper bill of particulars was not served.[436]

—— **Verification.** It has been held that the bill must be verified if the pleadings are verified,[437] but the better rule seems to be that the bill need not be verified unless so required by the order.[438] The annexing of an unverified bill to a verified complaint, which makes the bill a part thereof, is, however, sufficient as a verification.[439] The verification may well be in the form provided for verification of pleadings, but a simple form would seem to be sufficient as where the affidavit merely states

[432] Brown v. Williams, 4 Wend. 360; Stowits v. Bank of Troy, 21 Wend. 186.

[433] Gay v. Cary, 9 Cow. 45.

[434] John S. Way Mfg. Co. v. Corn, 66 How. Pr. 152, 5 Month. Law Bul. 81.

[435] Stevens v. Webb, 4 Civ. Proc. R. (Browne) 64.

[436] Laraway v. Fischer, 19 State Rep. 650, 3 N. Y. Supp. 691.

[437] Withers v. Toulmin, 10 State Rep. 704, 13 Civ. Proc. R. (Browne) 1. See, also, Brauer v. Oceanic Steam Nav. Co., 26 App. Div. 623, 49 N. Y. Supp. 937.

[438] Shankland v. Bartlett, 15 Civ. Proc. R. (Browne) 24, 17 State Rep. 285, 28 Wkly. Dig. 526, 1 N. Y. Supp. 458.

[439] S. Liebmann's Sons Brewing Co. v. Cody, 21 App. Div. 235.

that "the foregoing is a correct bill of particulars of the" demand, or counter claim, sued on, or that the bill is true "to the best of the knowledge and belief" of the affiant.[440] Want of verification of the bill is waived by retaining it without objection.[441]

—— **Amendments.** The bill is amendable,[442] even on the trial,[443] and the amendment may be allowed by a referee.[444]

§ 813. More specific bill.

If the bill of particulars does not comply with the order or is not sufficiently explicit, it should be returned and a motion made at special term, on notice, for a more specific bill.[445] It is not necessary to make a new and specific demand for further particulars.[446] Such motion must be made before trial,[447] within a reasonable time after the bill is served,[448] and be supported by affidavit which should state that a bill has been served pursuant to order and then show in what respect the bill is insufficient. A copy of the bill served should be attached to the moving papers. Whether the order shall be granted rests in the sound discretion of the court.[449] If granted, the order may direct that if a further bill is not served, so much of the pleading as is affected by the want of the bill, may be stricken out.[450]

If the second bill is not sufficient, and the order therefor does not prescribe the penalty for failure to serve a proper bill, the better practice would seem to be to move before trial for an or-

[440] Grey v. Vorhis, 8 Hun, 612.

[441] Hoag v. Weston, 10 Civ. Proc. R. (Browne) 92, 24 Wkly. Dig. 91.

[442] Case v. Pharis, 106 N. Y. 114; Melvin v. Wood, 3 Keyes, 533, 4 Abb. Pr., N. S., 438.

[443] Parsons v. Sutton, 66 N. Y. 92.

[444] Williams v. Davis, 7 Civ. Proc. R. (Browne) 282.

[445] Gas-Works Const. Co. v. Standard Gaslight Co., 16 State Rep. 1001, 1 N. Y. Supp. 265.

[446] Ward v. Littlejohn, 17 Civ. Proc. R. (Browne) 178, 25 State Rep. 340, 2 Silv. Sup. Ct. 589, 6 N. Y. Supp. 170.

[447] Cadwell v. Goodenough, 25 Super. Ct. (2 Rob.) 706.

[448] McCourt v. Cowperthwait, 31 Misc. 802.

[449] Schile v. Brokhahne, 41 Super. Ct. (9 J. & S.) 353; Ward v. Littlejohn, 17 Civ. Proc. R. (Browne) 179; Mendelsohn v. Frankel, 84 N. Y. Supp. 586.

[450] Wilson v. Fowler, 44 Hun, 89.

der precluding the giving evidence on the trial as to the matters concerning which particulars are sought. The pleading will not ordinarily be stricken out.[451]

§ 814. Penalty for disobedience.

The penalty for disobedience of the order requiring a bill of particulars is usually inserted in the order, as by providing for exclusion of evidence as to the matters as to which particulars are sought, but if not inserted, the moving party may, after the time has elapsed in which to serve a bill pursuant to the order, (1) apply by motion at special term to strike out the pleading or to dismiss the action, or (2) that the party shall be precluded from giving evidence of the facts as to which particulars were required or (3) that a stay of proceedings be granted until compliance with the order.[452] Ordinarily, however, the pleading will not be stricken out.[453]

Failure to serve the bill, where sought to enable defendant to plead, is waived by answering. The omission can only be taken advantage of by motion, before answer, to set aside the proceedings or stay them until a bill is served.[454]

§ 815. Effect of bill.

A bill of particulars is to be construed as a part of the pleading, but it does not change the nature of the action and cannot be pleaded to. But while the bill cannot enlarge the cause of action alleged in the complaint so as to authorize the admission of evidence not otherwise admissible,[455] it limits the evidence admissible to evidence of the matters set forth in the bill[456] except where the evidence is not intended as a basis for a recovery,[457] and also limits the recovery to the matters set forth in the bill unless the variance between the proof offered on the trial and the allegations in the bill of particulars could not

451 Raff v. Koster, Bial & Co., 37 App. Div. 534.
452 Gross v. Clark, 87 N. Y. 272.
453 Raff v. Koster, Bial & Co., 37 App. Div. 534.
454 Norcott v. First Baptist Church of Rome, 8 Hun, 639.
455 American Broom & Brush Co. v. Addickes, 19 Misc. 36; Lee v. Flint, N. Y. Daily Reg., Dec. 29, 1884.
456 Bowman v. Earle, 10 Super. Ct. (3 Duer) 691.
457 Dodge v. Weill, 158 N. Y. 346.

have misled the adverse party;[458] but any objection to evidence on the ground that it is not within the scope of the bill must be made at the time the evidence is introduced,[459] and if plaintiff is allowed to amend his complaint to conform to the proof, the recovery is not limited by the bill of particulars previously served.[460] A voluntary bill has the same effect as if given in pursuance of an order,[461] but it would seem that where a bill of particulars is furnished after presentation of a claim against the estate of decedent, it will not limit the evidence in an action subsequently brought to collect such claim.[462]

ART. VI. SERVICE AND WITHDRAWAL OF PLEADINGS.

§ 816. Necessity of service in general and time therefor.

If a copy of the complaint is not served with the summons, defendant's attorney, may within twenty days, serve on plaintiff's attorney a written demand for a copy of the complaint which must be served within twenty days thereafter.[463] This demand may be incorporated into the notice of appearance.[464] But where the same attorney appears for two or more defend-

[458] Hoag v. Weston, 10 Civ. Proc. R. (Browne) 92.

[459] Delaware & Hudson Canal Co. v. Dubois, 15 Wend. 87; Chadbourne v. Delaware, L. & W. R. Co., 6 Daly, 215; Colrick v. Swinburne, 105 N. Y. 503.

[460] Moore v. King, 57 Hun, 224, 32 State Rep. 808.

[461] Williams v. Allen, 7 Cow. 316; Payne v. Smith, 19 Wend. 122; Chrysler v. James, 1 Hill, 214.

[462] Deveney v. Head, 64 App. Div. 615, 72 N. Y. Supp. 248.

[463] Code Civ. Proc., § 479.

See ante, §§ 708-710, as to right of plaintiff to take judgment by default without application to the court, as affected by service of the complaint with the summons.

In the New York City court, the defendant must demand copy of the complaint, if at all, and plaintiff must serve the same after demand thereof, within the time allowed defendant in such court to serve a copy of his answer. Code Civ. Proc. § 3166.

[464] Code Civ. Proc. § 479.

ants only one copy of the complaint need be served on him; and if after service of a copy of the complaint on him, as attorney for a defendant, he appears for another defendant, the last defendant must answer the complaint within twenty days after he appears in the action.[465] If the complaint is not served with the summons, a service thereof before defendant's appearance or demand for a copy thereof, is of no effect.[466] The right to demand a copy of the complaint is not taken away by service by mail[467] though the contrary rule prevails where the summons and complaint are personally served without the state under an order for service by publication.[468] Notice of appearance stating that "I require all papers to be served on me," specifying a place for service, is a sufficient demand.[469] If the complaint is not served within twenty days after demand, defendant is entitled to have the action dismissed as to him.[470] But the default may be opened and permission granted to serve the complaint.[471]

As to subsequent pleadings, the Code provides that a copy of each pleading, subsequent to the complaint, must be served on the attorney for the adverse party, within twenty days after service of a copy of the preceding pleading.[472] A pleading cannot be served after the time prescribed, without leave,[473] though before the adverse party has acted on the default.[474]

The copy served should be a correct copy as it will control where it differs from the original pleading.[475] If an incorrect copy is served, however, it would seem that a correct copy may

[465] Code Civ. Proc. § 479.

[466] Sweet v. Sanderson Bros. Steel Co., 6 Civ. Proc. R. (Browne) 69.

[467] Van Zandt v. Van Zandt, 23 Abb. N. C. 328.

[468] Skinner v. Skinner, 23 Abb. N. C. 327.

[469] Walsh v. Kursheedt, 8 Abb. Pr. 418; Ferris v. Soley, 23 How. Pr. 422.

[470] Eleventh Ward Bank v. Powers, 43 App. Div. 178.

[471] Smith v. Gouraud, 76 Hun, 343; Eleventh Ward Bank v. Powers, 43 App. Div. 178.

[472] Code Civ. Proc. § 520.

Forty days is allowed where service is by mail. Code Civ. Proc. § 798.

[473] O'Brien v. Catlin, Code R., N. S., 273.

[474] McGown v. Leavenworth, 2 E. D. Smith, 24.

[475] Trowbridge v. Didier, 11 Super. Ct. (4 Duer) 448; McCarron v. Cahill, 15 Abb. N. C. 282; Kleuert v. Iba, 17 Misc. 69. But if the orig-

be thereafter served within the time limited therefor with like effect as if the first copy had been a correct one.[476] Within ten days after service, the pleading must be filed with the clerk.[476a]

Extension of time to serve a pleading is permissible. This has been already considered in connection with the Code rule relating to extension of time in general[477] which provides that after the expiration of the time, the court, upon good cause shown, may, in its discretion, and upon such terms as justice requires, relieve the party from the consequences of the omission to do the act, and allow it to be done.[478] But when the time to serve any pleading has been extended by stipulation or order for twenty days, no further time shall be granted by order except upon two days' notice to the adverse party of the application for such order.[479] Extending the time to answer or demur will be treated of hereafter.[480]

The mode of serving a pleading is governed by the Code provisions relating to the service of papers generally which have been treated of in a preceding chapter.[481]

§ 817. Service of answer on co-defendant.

Where the judgment may determine the ultimate rights of two or more defendants, as between themselves, a defendant who requires such a determination must demand it in his answer, and must at least twenty days before the trial serve a copy of his answer upon the attorney for each of the defendants to be affected by the determination, and personally, or as the court or judge may direct, upon defendants so to be affected who have not duly appeared therein by attorney.[482] This provision does not require service when the relief demanded in the complaint is substantially that asked in the co-defendant's

inal does not conform to the copy served, the opposing party should not move to conform the original but should move to strike out or to set aside the service of the complaint. Boston Nat. Bank v. Armour, 50 Hun, 176, 20 State Rep. 29, 16 Civ. Proc. R. (Browne) 147.

476 Hamilton v. Gibbs, 18 Civ. Proc. R. (Browne) 211.

476a Code Civ. Proc. § 824.

477 See ante, § 683.

478 Code Civ. Proc., § 783.

479 Rule 24 of General Rules of Practice.

480 See post, § 852.

481 See ante, §§ 649-663.

482 Code Civ. Proc. § 521.

answer[483] nor where the title by which a co-defendant claims is set forth in the complaint, so that, from the notice thus given, the other defendant was bound to know that such claim might and probably would be preferred at the trial, and if then established, must be allowed.[484] Furthermore, it only includes those rights arising out of, or connected with, or resulting from plaintiff's cause of action, and does not permit a defendant to set up a new cause of action subverting that relied on by plaintiff.[485] Service on a defendant who has not been served with summons and cannot be subjected to the jurisdiction by attachment, is ineffective.[486] The co-defendant served need not reply.[487]

§ 818. Service of amended pleading.

It is the better practice, on allowing an amendment, to require the amended pleading to be served on the opposite party[488] and it would seem that if the amendment of a complaint is in a matter of substance it must be served on defendant though such amendment is made after default.[489] On the other hand, where an amendment of the answer is allowed on the trial, it need not be served, unless such service is made a condition of the allowance.[490]

——**Service of pleading amended as of course.** Where a pleading is amended, as of course, without application to the court, as allowed by section 542 of the Code, a copy thereof must be served on the attorney for the adverse party.[491] But where a defendant has no attorney, service of an amended complaint cannot be made upon him except upon an order of the

[483] Edwards v. Downs, 13 Wkly. Dig. 57.

[484] Leavitt v. Fisher, 11 Super. Ct. (4 Duer) 1.

[485] Smith v. Hilton, 50 Hun, 236; New York Life Ins. & Trust Co. v. Cuthbert, 87 Hun, 339; Bliss v. Winters, 26 Misc. 38.

[486] Joy v. White, 22 Abb. N. C. 304.

[487] Havana City Ry. Co. v. Ceballos, 49 App. Div. 421.

[488] Shaw v. Grant, 49 State Rep. 404; La Chicotte v. Richmond Ry. & Electric Co., 15 App. Div. 380; Waltham Mfg. Co. v. Brady, 67 App. Div. 102.

[489] People ex rel. Rumsey v. Woods, 4 Super. Ct. (2 Sandf.) 652; Palmer v. Salisbury, 38 App. Div. 139.

[490] Lane v. Hayward, 28 Hun, 583.

[491] Code Civ. Proc. § 543.

court, and he is not prejudiced in his rights by failure to return an amended complaint served without leave of the court.[492] Service may be made within twenty days after service of the original pleading, if the original, though objected to as a nullity, is not returned.[493]

§ 819. Withdrawal of pleadings.

A party may withdraw his pleading as a matter of course and serve a new pleading within the time allowed to amend as of course.[494] But a party cannot withdraw his demurrer and put in an answer as an amendment of course, or vice versa.[495]

And even after the time allowed to amend as of course the court may allow a party to withdraw his pleading, but where other parties to the action have an interest in retaining upon the records an answer which has been interposed, it rests in the discretion of the court whether it will permit the answer of one of the defendants to be withdrawn.[496]

ART. VII. VERIFICATION OF PLEADINGS.

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492 Durham v. Chapin, 13 App. Div. 94.

493 Walker v. Bissell, 3 Month. Law Bul. 16.

494 Amendments of course, see post, § 901.

495 See post, p. 1025.

496 Cushman v. Leland, 93 N. Y. 652.

A withdrawal by one defendant, as to himself, of a joint answer, does not affect the position of his co-defendant. Reeder v. Lockwood, 30 Misc. 531.

§ 820. Introductory.

The verification of a pleading is an affidavit attached thereto wherein the party or his representative states on oath that the facts stated in the pleading are true or believed to be true. The purpose thereof is to compel the truth to be stated in a pleading. The verification is not a part of the pleading.[497]

§ 821. Right to verify.

A plaintiff may, in any case, verify his complaint. And a defendant may verify his answer though the complaint is not verified and thereby require the reply, if any, to be verified.[498]

§ 822. Necessity.

As to the necessity of verifying a pleading the Code provides as follows: "Where a pleading is verified, each subsequent pleading, except a demurrer, or the general answer of an infant by his guardian ad litem, must also be verified. But the verification may be omitted, in a case where it is not otherwise specially prescribed by law, where the party pleading would be privileged from testifying, as a witness, concerning an allegation or denial contained in the pleading."[499] But "a defendant is not excused from verifying his answer to a complaint, charging him with having confessed or suffered a judgment, or executed a conveyance, assignment, or other instrument, or transferred or delivered money, or personal property, with intent to hinder, delay, or defraud his creditors; or with being a party or privy to such a transaction by another person, with like intent towards the creditors of that person;

[497] Town of Fort Covington v. United States & C. R. Co., 8 App. Div. 223; Pardi v. Conde, 27 Misc. 496.
[498] Levi v. Jakeways, 4 How. Pr. 126.
[499] Code Civ. Proc. § 523.

or with any fraud whatever, affecting a right or the property of another."[500] "A defense, which does not involve the merits of the action, cannot be pleaded, unless it is verified."[501] The Code abolished the rule requiring special verification to a plea in bar to a declaration on a written instrument or record, and adopted a new mode of verification in all cases.[502]

Analyzing these Code provisions, it is seen that no reference is made to the complaint though in another chapter of the Code it is provided that the complaint must be verified in an action brought to charge defendants not personally summoned.[503] But for certain purposes the complaint must be verified, as where the plaintiff intends to ask for a temporary injunction[504] or where he desires to obtain an order for service of summons by publication.[505]

If the complaint is verified, however, each "subsequent" pleading except a demurrer or the general answer of an infant, must also be verified. By "subsequent" pleadings are meant pleadings subsequent in order and not subsequent in time, and hence an amended pleading is not a subsequent pleading.[506] This rule presupposes, however, that the verification of the complaint is sufficient. If clearly defective, the defendant has the right to disregard it and serve an unverified answer.[507] So an unverified answer is proper where the copy of the complaint served is not verified, though the original is verified,[508] or where the verification of the complaint is improperly made by an attorney;[509] and it is not necessary to obtain leave of court to serve an unverified answer.[510] But an

500 Code Civ. Proc. § 529.

501 Code Civ. Proc. § 513.

502 Gamble v. Beattie, 4 How. Pr. 41.

503 Code Civ. Proc. § 1938.

504 See post, vol. II.

505 See ante, § 739.

506 Hempstead v. Hempstead, 7 How. Pr. 8; Duval v. Busch, 21 Abb. N. C. 214, 13 Civ. Proc. R. (Browne) 366, 13 State Rep. 752.

507 Waggoner v. Brown, 8 How. Pr. 212; Treadwell v. Fassett, 10 How. Pr. 184; People ex rel. Smith v. Allen, 14 How. Pr. 334; Phonoharp Co. v. Stobbe, 20 Misc. 698.

508 Hughes v. Wood, 12 Super. Ct. (5 Duer) 603, note; Klenert v. Iba, 17 Misc. 69.

509 Peyser v. McCormack, 7 Hun, 300.

510 Moloney v. Dows, 2 Hilt. 247.

amended complaint, where verified, requires a verified answer, though the original complaint was not verified.[511] If an action is brought against three and a verified complaint served on two of the defendants and an unverified one on the other defendant, the interest of the defendants being several, plaintiff is entitled to a verified answer from the two, but not from the third defendant, and hence it is improper to serve an unverified joint answer.[512] A reply must be verified if the answer is verified and, as stated, the right to verify the answer exists independent of whether the complaint is verified.[513]

In an action by or against a corporation, plaintiff is not required on the trial to prove the existence of the corporation, unless the answer is verified and contains an affirmative allegation that plaintiff or defendant, as the case may be, is not a corporation.[514] But it is not necessary to put in a verified answer where there is no allegation in the complaint that defendant is a corporation.[515] The verified answer is not sufficient, where it merely denies incorporation, but there must be an affirmative allegation that plaintiff or defendant is not a corporation.[516]

As stated above, the verification of a subsequent pleading may be omitted where the party pleading would be privileged from testifying concerning an allegation or denial contained in the pleading, except where fraud is charged.[517] A witness is excused from testifying where his answer would tend to accuse him of a crime or misdemeanor or to expose him to a penalty or forfeiture.[518] In applying this rule it has

511 Thum v. Iserman, 25 Misc. 793.

512 Wendt v. Peyser, 14 Hun, 114.

513 Levi v. Jakeways, 4 How. Pr. 126.

514 Code Civ. Proc. § 1776.

515 Brooks v. Farmers' Creamery Ass'n, 21 Wkly. Dig. 58.

516 Nickerson v. Canton Marble Co., 35 App. Div. 111; Lamson Consolidated Store Service Co. v. Conyngham, 10 Misc. 772.

517 Under Code of 1848, verification might be omitted when the matter might aid in forming a chain of testimony to convict of a criminal offense, if properly receivable in evidence.

Section 157 of the old Code, § 157, as amended in 1851, provided that verification might be omitted when admission of the truth of the allegation might subject the party to prosecution for felony.517

518 Code Civ. Proc. § 837.

been held that an action against a trustee of a manufacturing corporation to recover a debt of the company because of failure to file an annual report is for a penalty, and verification of the answer may be omitted,[519] but that an action against a trustee of a social club to recover debts of the club, is not a penal action so as to relieve defendant from the necessity of serving a verified answer.[520] So allegations in a negligence case that defendant was drunk in a public place at the time of the injury, need not be answered under oath.[521] And an answer in an action for libel need not be verified.[522] A conflict in the authorities as to the necessity of verifying the answer in an action for divorce on the ground of adultery was settled by the Code provision that one sued for divorce on the ground of adultery, need not verify the answer.[523] If any part of the pleading would excuse a party from testifying or if there is more than one party and any one would be privileged, verification may be omitted;[524] and the fact that in the same answer defendant has the right to plead other defenses does not take away the right to answer without verification.[525] But in so far as an exemption is provided by the Code provision relating to omitting verification where the party is privileged from testifying, it must be regarded as qualified by the subsequent provision that a defendant is not excused from verifying his answer to a complaint charging him with certain named frauds or "with any fraud whatever affecting a right or the property of another."[526] Thus, in an action to recover the price paid for goods sold, on the ground of false representations, an unverified answer cannot be served on the ground that the party would be privileged from testifying as

519 Gadsden v. Woodward, 103 N. Y. 242.

520 Rogers v. Decker, 131 N. Y. 490.

521 Rutherford v. Krause, 8 Misc. 547.

522 Wilson v. Bennett, 2 Civ. Proc. R. (Browne) 34; Batterman v. Journal Co., 28 Misc. 375.

523 Code Civ. Proc. § 1757.

524 Clapper v. Fitzpatrick, 3 How. Pr. 314.

525 Martin v. Bernheim, 24 Civ. Proc. R. (Scott) 441, 68 State Rep. 718, 34 N. Y. Supp. 784.

526 Beckley v. Chamberlain, 47 State Rep. 56, 65 Hun, 37, 22 Civ. Proc. R. 338.

Contra,—Frist v. Climm, 6 Civ. Proc. R. (Browne) 30, 67 How. Pr. 214.

a witness.[527] Furthermore, this privilege does not give to a defendant the right to set up "new matter" in avoidance founded upon accusations against himself as to which he would be privileged from testifying as a witness, without verification of the same. The exemption is confined to the answering allegations.[528] If verification is omitted because the pleader would be privileged from testifying, a general affidavit should be served with the pleading, stating the reason why the verification is omitted,[529] except where the pleadings themselves show that defendant would be privileged from testifying as a witness.[530]

§ 823. Who may verify.

The Code expressly provides as to who may verify a pleading.[531] It points out a particular class of persons who may verify except in one instance, where it provides that if the people of the state are, or a public officer in their behalf is, a party, the verification may be made by any person acquainted with the facts.[532]

—— **Party.** Except as otherwise provided, the verification must be made by the affidavit of the party; and all the parties must unite in the verification except where they are united in interest and plead together, in which case the verification must be made by at least one of them who is acquainted with the facts.[533] The word "party" includes the real party in interest, though not a party of record;[534] a guardian ad litem of an infant plaintiff;[535] and the treasurer of a voluntary as-

527 Beckley v. Chamberlain, 47 State Rep. 56. Contra,—Frist v. Climm, 6 Civ. Proc. R. (Browne) 30, 67 How. Pr. 214.

528 Fredericks v. Taylor, 52 N. Y. 596.

529 Moloney v. Dows, 2 Hilt. 247; Springsted v. Robinson, 8 How. Pr. 41; Dehn v. Mandeville, 68 Hun, 335; Roache v. Kivlin, 25 Hun, 150; Lynch v. Todd, 13 How. Pr. 546.

530 Anderson v. Doty, 33 Hun, 238; Goff v. Star Printing Co., 21 Abb. N. C. 211.

531 Code Civ. Proc. § 526.

532 Code Civ. Proc. § 525.

533 Code Civ. Proc. § 525.

534 Taber v. Gardner, 6 Abb. Pr., N. S., 147.

535 Clay v. Baker, 41 Hun, 58; Anable v. Anable, 24 How. Pr. 92.

But a guardian ad litem cannot verify until actually appointed. Hill v. Thacter, 3 How. Pr. 407.

sociation sued in the name of its treasurer.[536] As examples of persons united in interest may be mentioned, co-partners sued for injuries resulting from the negligence of their servant,[537] or for goods sold where they admit liability in part;[538] husband and wife sued on a joint contract executed by them;[539] and persons sued together for a tort though the complaint charges each of them for the wrong:[540] on the other hand, the maker and indorser of a note are not united in interest, though their defenses are identical.[541]

—— **Officer of domestic corporation.** If the party is a domestic corporation, the verification must be made by an officer thereof.[542] Standing by itself this language would seem to indicate that an officer of a domestic corporation is the only person who can verify the pleading of such a corporation. But it is held that this provision must be construed in connection with the provision authorizing an agent or attorney, in certain instances, to verify a pleading, and hence that in an action brought by a domestic corporation the complaint may be verified by its attorney where it appears from the verification that all the officers of the corporation are absent from the county where the attorney resides;[543] and that an attorney or agent may verify where in possession of the written instrument for the payment of money only on which the action is founded.[544]

A director is an officer,[545] but an ex-president is not an offi-

536 Tallmadge v. Lounsbury, 23 Abb. N. C. 331.

537 Mooney v. Ryerson, 8 Civ. Proc. R. (Browne) 435.

But it seems that one partner cannot verify "on information and belief" so as to make the verification sufficient as to the other partner. Lacy v. Wilkinson, 7 Civ. Proc. R. (Browne) 104.

538 Paddock v. Palmer, 32 Misc. 426.

539 Hartley v. James, 18 Abb. Pr. 299.

540 Zoellner v. Newberger, 1 Month. Law Bul. 29.

541 Alfred v. Watkins, Code R., N. S., 343; Hull v. Ball, 14 How. Pr. 305.

542 Code Civ. Proc. § 525.

543 Climax Specialty Co. v. Smith, 31 Misc. 275, 7 Ann. Cas. 373; High Rock Knitting Co. v. Bronner, 18 Misc. 627, 77 State Rep. 725.

544 Syracuse Moulding Co. v. Squires, 39 State Rep. 824, 21 Civ. Proc. R. (Browne) 58, 61 Hun, 48, 15 N. Y. Supp. 321.

545 Bigelow v. Whitehall Mfg. Co., 1 City Ct. R. 138.

cer and cannot verify though there is no other officer of the corporation inasmuch as all the officers have tendered their resignations and their vacancies have not been filled.[546] And a general manager is not necessarily an officer though it seems that he may be.[547] The officer need not be a general officer.[548] And an attorney for a railroad company, appointed to verify in its behalf petitions in condemnation proceedings, has been held an officer of the corporation entitled to verify a pleading in its behalf.[549]

—— **Agent or attorney.** The verification may be made by an agent of, or the attorney for, the party in the following cases:[550]

(a) Where the party is a foreign corporation.[551]

(b) Where the party is not within the county where the attorney resides, or, if the latter is not a resident of the state, the county where he has his office, and capable of making the affidavit.[552] The mere fact that the client cannot be found within the city, however, does not authorize a verification by his attorney.[553] An attorney may verify a pleading in behalf of a nonresident client, though it appears the client has a resident agent, and that it is through him the attorney has obtained his information.[554] But when an attorney verifies an answer in the absence of defendant from the county, he must seek his information from a proper quarter, either from defendant himself or from some one in a position to know the facts better than defendant.[555] An attorney cannot acquire

[546] Kelly v. Woman Pub. Co., 15 Civ. Proc. R. (Browne) 259, note.

[547] Thomas F. Meton & Sons v. Isham Wagon Co., 15 Civ. Proc. R. (Browne) 259.

[548] Matter of St. Lawrence & A. R. Co., 133 N. Y. 270, 45 State Rep. 207.

[549] Matter of St. Lawrence & A. R. Co., 133 N. Y. 270, 45 State Rep. 207.

[550] Code Civ. Proc. § 525, subd. 3.

[551] An officer is an agent. Robinson v. Ecuador Development Co., 32 Misc. 106.

[552] As to applicability of this clause to domestic corporations, see ante, p. 901.

[553] Lyons v. Murat, 54 How. Pr. 23.

[554] Drevert v. Appsert, 2 Abb. Pr. 165.

[555] Stedeker v. Taft, 4 Month. Law Bul. 88.

sufficient knowledge from conversations with one partner to enable him to verify an answer denying information sufficient to form a belief on the part of the firm.[556] When a complaint is subscribed by an attorney giving an address in the city of New York as his office address, and the verification is made by him in that county, it can be inferred that he resides in the said county, so as to entitle him to verify the complaint.[557]

(c) Where there are two or more parties united in interest and pleading together, and neither of them, acquainted with the facts, is within the county where the attorney resides, or where he has his office, if nonresident, and capable of making the affidavit.

(d) Where the action or defense is founded on a written instrument for the payment of money only, which is in the possession of the agent or the attorney,[558] the agent or attorney may verify the complaint whether or not he and plaintiff be within the same county,[559] and this rule applies to the verification of a reply.[560]

(e) Where all the material allegations of the pleading are within the personal knowledge of the agent or the attorney.[561]

An attorney or agent may verify on information and belief,[562] except where he verifies on the ground that all the material allegations of the pleading are within his personal knowledge,[562a] even though the pleading verified is a denial of knowledge or information sufficient to form a belief, where the attorney verifying gives as grounds for his belief statements made to him by his client.[563] But this rule does not permit a denial of information of a fact which must be within the

[556] Stedeker v. Bernard, 12 Daly, 212.

[557] Morrison v. Watson, 23 Wkly. Dig. 286.

[558] As to what is an "instrument for the payment of money only," see ante, p. 854.

[559] Wheeler v. Chesley, 14 Abb. Pr. 441.

[560] Kirkland v. Aiken, 66 Barb. 211.

[561] Boston Locomotive Works v. Wright, 15 How. Pr. 253.

[562] Dixwell v. Wordsworth, 2 Code R. 1; Stannard v. Mattice, 7 How. Pr. 4; Lefevre v. Latson, 7 Super. Ct. (5 Sandf.) 650, 10 N. Y. Leg. Obs. 246; Beyer v. Wilson, 46 Hun, 397; Wilkin v. Gilman, 13 How. Pr. 225; qualifying Hunt v. Meacham, 6 How. Pr. 400, to the contrary.

[562a] Moran v. Helf, 52 App. Div. 481.

[563] Neuberger v. Webb, 24 Hun, 347.

party's knowledge followed by a verification by the attorney or an agent.[564] And where verification of an answer, made by the defendant's agent or attorney, contains an allegation inconsistent with an allegation in the answer, defendant may be required to verify in person.[565]

§ 824. Sufficiency of verification.

"The affidavit of verification must be to the effect, that the pleading is true to the knowledge of the deponent, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true. Where it is made by a person, other than the party, he must set forth, in the affidavit, the grounds of his belief, as to all matters not stated upon his knowledge, and the reason why it is not made by the party."[566] While the verification need not be in the exact language of the Code, a substantial compliance therewith is required.[567] And it is the safer practice to follow the precise words of the Code in so far as applicable. It has been held not sufficient to say "substantially true"[568] or "true according to his best knowledge and belief"[569] or "true except as to the matters therein stated,"[570] etc., or that plaintiff "has read the foregoing complaint, and knows the contents thereof, and that the same is true,"[571] or that affiant "knows the foregoing answer to be true."[572] On the other hand, a statement that affiant "knows the contents" of the petition, "and that the same are true," has been held equivalent to saying that "they are true to her knowledge."[573] So, stating that the "facts" are true instead of "matters" has been held sufficient.[574] Of course if no allegations in the

564 Pardi v. Conde, 27 Misc. 496.
565 Jaillard v. Tomes, 3 Abb. N. C. 24.
566 Code Civ. Proc. § 526.
567 Sexaner v. Bowen, 10 Abb. Pr., N. S., 335.
568 Waggoner v. Brown, 8 How. Pr. 212.
569 Van Horne v. Montgomery, 5 How. Pr. 238.
570 Sexaner v. Bowen, 10 Abb. Pr., N. S., 335.
It must be stated that the matters are true "to his knowledge." Tibballs v. Selfridge, 12 How. Pr. 64.
571 Williams v. Riel, 12 Super. Ct. (5 Duer) 601.
572 Cherry v. Foley, 42 State Rep. 188, 16 N. Y. Supp. 853.
573 Matter of Macauley, 94 N. Y. 574.
574 Whelpley v. Van Epps, 9 Paige, 332.

pleading are on information and belief, the verification need not contain the words "except as to the matters therein stated to be alleged on information and belief."[575] On the other hand, if all the allegations of the pleading are stated to be on information and belief, a verification is sufficient which states that the pleading is true as affiant is informed and believes, since the usual clause of absolute verification, of absolute allegations, would be useless.[576]

The rules relating to affidavits in general[577] govern the formal parts of the verification. The rules as to who may administer oaths have been already considered[578] and the rules there stated apply to the oath required in verifying a pleading.[579] So where the verification is made in another state, the authentication is governed by rules previously stated as to affidavits made without the state.[580]

Where the complaint is not verified, and the answer sets up a counterclaim, and also a defense by way of denial or avoidance, the affidavit of verification may be made to refer exclusively to the counterclaim.[581]

—— **Verification by party.** If the verification is made by a party, no difficulty should be experienced as it is enough to merely follow the words of the statute so far as they apply.[582] If the verification is by one only of two parties united in interest, such fact need not be stated in the verification nor need it allege that he is acquainted with the facts where these matters appear from the pleadings expressly or pre-

[575] Bowghen v. Nolan, 53 How. Pr. 485; Ladue v. Andrews, 54 How. Pr. 160; Ross v. Longmuir, 15 Abb. Pr. 326; Kinkaid v. Kipp, 8 Super. Ct. (1 Duer) 692.

[576] Orvis v. Goldschmidt, 2 Civ. Proc. R. (Browne) 314, 64 How. Pr. 71, 2 Civ. Proc. R. (McCarty) 250; Harnes v. Tripp, 4 Abb. Pr. 232.

[577] See ante, §§ 528-549.

[578] See ante, § 532.

[579] Party cannot verify a pleading before his own attorney. Gilmore v. Hempstead, 4 How. Pr. 153.

[580] See ante, § 541; Phelps v. Phelps, 6 Civ. Proc. R. (Browne) 117.

[581] Code Civ. Proc. § 527.

The form of verification in such a case should aver "that the counterclaim contained in the foregoing answer, set forth as the —— defense therein, is true" etc.

[582] As before noted, this rule applies where the verification is by a guardian ad litem.

sumptively.[583] Where several parties verify the same pleading, it is proper to say, "These defendants severally say, each for himself, that he has," etc. But other equivalent words are sufficient.[584]

—— **Verification by officer of domestic corporations.** Verification by an officer of a corporation is deemed a verification by the party so that the grounds of belief need not be stated.[585] If the verification is made by one not generally considered an officer, such as the general manager of a domestic corporation, he should state the duties of that office so as to show that he is an officer of the corporation.[586]

—— **Verification by attorney, agent or person acquainted with the facts.** If the verification is made by an agent or attorney or by one other than the party, he must set forth in the affidavit the grounds of his belief as to all matters not stated upon his knowledge, and the reason why it is not made by the party.[587] And this rule applies where the verification is made by an attorney or agent on the ground that he has in his possession the written instrument sued on.[588] But if the verification states that the facts set forth are true of deponent's own knowledge, it need not, in addition, aver either the absence of plaintiff from the county,[589] or any other rea-

583 Paddock v. Palmer, 32 Misc. 426.

584 Kinkaid v. Kipp, 8 Super. Ct. (1 Duer) 692, 11 N. Y. Leg. Obs. 313.

585 American Insulator Co. v. Bankers' & Merchants' Telegraph Co., 7 Civ. Proc. R. (Browne) 443, 13 Daly, 200; Duryea, Watts & Co. v. Rayner, 11 Misc. 294.

586 Thomas F. Meton & Sons v. Isham Wagon Co., 15 Civ. Proc. R. (Browne) 259.

587 Code Civ. Proc. § 526. Under the old Code (Code Pro. § 157) the affidavit was required to state specifically deponent's knowledge of each material fact, where the facts were stated positively in the pleading.

People ex rel. Smith v. Allen, 14 How. Pr. 334; Bank of State of Maine v. Buel, 14 How. Pr. 311; Boston Locomotive Works v. Wright, 15 How. Pr. 253.

An officer of a foreign corporation who verifies its pleading must set forth the grounds of his belief. Robinson v. Ecuador Development Co., 32 Misc. 106.

588 Meads v. Gleason, 13 How. Pr. 309; Treadwell v. Fassett, 10 How. Pr. 184; Soutter v. Mather, 14 Abb. Pr. 440.

589 Gourney v. Wersuland, 10 Super. Ct. (3 Duer) 613.

son why the verification is not made by the party.[590] If the verification is by an agent, the nature of the agency need not be stated.[591] And while there must be a showing that the person verifying on the ground that he is in possession of the written instrument in suit, is an attorney or agent, yet a statement that plaintiff is absent and that affiant's knowledge is derived from the possession of the notes in suit, sufficiently alleges that the affiant is the agent of the plaintiff. The Code does not require a person who makes an oath to state that he is an agent, and if facts are presented from which that relation may be reasonably inferred, it ought to be considered as existing.[592]

While the statute requires a person not a party making a verification to state the grounds of his belief, it does not prescribe any particular phraseology or form in which it shall be done, and does not require that he shall label or preface his statement thereof with the recital in express words that they are his sources of belief. The object of the statute is that the court should be enabled to see from the affidavit of verification the authority and foundation upon which an attorney making a complaint in behalf of his client is acting, and the spirit of it is complied with when this result is accomplished.[593] In stating the source of belief, it is sufficient to state the name of the person from whom the information was obtained and how such information was obtained without giving the substance of the conversations or letters.[594] So stating that deponent's "knowledge" of all the material allegations is founded on communications, etc., instead of stating that his "information" was derived therefrom, while not to be commended, is not necessarily insufficient.[595] And a statement that the instrument sued on is in the possession of the attorney with the additional averment that the "instrument

[590] Betts v. Kridell, 20 Abb. N. C. 1, 13 Civ. Proc. R. (Browne) 157, 12 State Rep. 163.

[591] Beyer v. Wilson, 46 Hun, 397.

[592] Myers v. Gerrits. 13 Abb. Pr. 106.

[593] High Rock Knitting Co. v. Bronner, 18 Misc. 627; Dixwell v. Wordsworth, 2 Code R. 1.

[594] Duparquet v. Fairchild, 49 Hun, 471, 15 Civ. Proc. R. (Browne) 256; High Rock Knitting Co. v. Bronner 18 Misc. 627.

[595] Wilkin v. Gilman, 13 How. Pr. 225.

is the source of deponent's information and belief," is sufficient.[596] But if the verification is by an attorney on the ground that he has personal knowledge, and the facts are alleged positively in the pleading, it is not sufficient to state that the allegations are true and then add "the sources of deponent's information as to the facts alleged, are conversations with plaintiff."[597]

In setting forth the reason why the verification is not made by the party, it would seem the better practice to use the words of the Code in so far as they state the grounds for allowing a verification by an agent or attorney. If an attorney or agent of a foreign corporation verifies he need not state the reason why it is not made by a party since a corporation cannot, in any event, take an oath.[598] If the party is a domestic corporation, it is sufficient to state that the reason why this verification is not made by the plaintiff is because it does not reside in the county of * * *, and is a corporation."[599] So if the authority to verify comes from the possession of the instrument sued on it would seem that it is sufficient to say the affiant "has the contract" on which the action is brought, for the recovery of money only.[600] But it is not sufficient to state that deponent is more familiar with the matters in suit than the plaintiff.[601]

Forms of verification.

State of New York, } ss.
County of }

——— being duly sworn, says he is ——— the [plaintiff or defendant or guardian ad litem] in the above entitled action: that the foregoing [complaint] is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true. * * *

———.

Sworn to before me, this ——— day of ———, 190—.

———

Notary Public.

596 Hyde v. Salg, 27 Hun, 369.
597 Moran v. Helf, 52 App. Div. 481.
598 Robinson v. Ecuador Development Co., 99 State Rep. 427.
599 Clark's Cove Fertilizer Co. v. Stever, 29 Misc. 571.
600 Clark's Cove Fertilizer Co. v. Stever, 29 Misc. 571.
601 Boston Locomotive Works v. Wright, 15 How. Pr. 253.

—— Verification by officer of domestic corporation.

[Venue.]

X, being duly sworn says that he is * * *[602] of the * * * company, the above named * * *, who are a corporation created under, and by virtue of, the laws of the state of New York and [Add statement in preceding form].

[Jurat.] [Signature.][603]

—— Verification by agent or attorney.

[Venue.]

X, being duly sworn, says that he is the * * *[604] for the * * * in the above entitled action; and that the foregoing * * * is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters, he believes it to be true.

Deponent further says that the reason why this verification is not made by said * * *[605] is that he[606] is not within the county of * * * which is the county where deponent resides.[607]

Deponent further says that the ground of his belief as to all matters therein stated on information and belief is derived from * * *.

[Jurat.] [Signature.][608]

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[602] Here insert the name of the office, and, if the office is one not generally recognized as an office in a corporation, state the facts showing the duties thereof so as to inform the court of the nature of the office.

[603] Here insert the general allegation as set forth in the first form.

[604] Here insert the words "agent or attorney"; or, if the verification is in an action by the people or by a public officer in their behalf state residence, business, etc., of the deponent.

[605] Here insert word "plaintiff" or "defendant."

[606] If there are two or more plaintiffs or defendants, insert the words "neither of them."

[607] If the party is within the county, but unable to make the verification for any cause, state such fact, and why he cannot make the verification. If the reason why the affidavit is made by attorney or agent is that the party is a foreign corporation, no statement need be made, but if the reason is based on any other ground, it is well to use the words of the Code which enumerates such grounds, except that if the verification is made on the ground that all the material allegations are within the personal knowledge of the agent or attorney, the reason why the party does not make the affidavit need not be further stated.

[608] Here insert source of information, such as admissions, conversations or letters. If the right to verify is based on possession of a written instrument, it is sufficient to state that such instrument is the source of deponent's information and the ground of his belief.

—— **Verification by agent or attorney where all the material allegations are within his personal knowledge.**

[Venue.]

X, being duly sworn, says that he is * * *[609] and that the foregoing * * * is true to his own knowledge, and that the reason why the verification is not made by * * * is that all the material allegations of the said * * * are within the personal knowledge of the deponent.

[Jurat.] [Signature.][610]

—— **Verification by attorney or agent of foreign corporation.**

[Venue.]

X, being duly sworn, says that he is the attorney (or agent) for the * * * company, the above named * * *, who are a corporation created under, and by virtue of, the laws of the state of * * * and that the foregoing [Add statement in first form].

[Jurat.] [Signature.][611]

§ 825. Want of, and defects in, verification.

The Code provides as follows: "The remedy for a defective verification of a pleading is to treat the same as an unverified pleading. Where the copy of a pleading is served without a copy of a sufficient verification, in a case where the adverse party is entitled to a verified pleading, he may treat it as a nullity, provided he gives notice, with due diligence, to the attorney of the adverse party, that he elects so to do."[612] The verification may be amended[613] and a nunc pro tunc amendment has been allowed by inserting the words "city and county."[614]

—— **Of complaint.** A defective or unauthorized verification of a complaint, while relieving the defendant from the necessity of answering under oath, does not render the complaint

[609] State that the deponent is the attorney, or that if an agent he is located at a certain place, and briefly describe the nature of the agency, in order to show that he is such an agent as would be presumed to have knowledge of the matter in controversy.

[610] This verification was held sufficient in Ross v. Longmuir, 15 Abb. Pr. 326.

[611] Here insert the general allegation as to knowledge or belief, and also set forth the sources of information and grounds of belief for any matters so stated in the pleading on information and belief.

[612] Code Civ. Proc. § 528; Jones v. Seaman, 30 Misc. 65.

[613] Davis v. Potter, 4 How. Pr. 155.

[614] Yellow Pine Co. v. Atlantic Lumber Co., 21 Misc. 164.

defective[615] so as to be demurrable[616] or subject to be set aside.[617] If, however, defendant refuses to allow a corrected copy of the complaint to be served, plaintiffs may move for judgment as in case of failure to answer.[618]

—— **Of answer.** If the answer, where required to be verified, is defectively verified, plaintiff may return it with a specific statement of the defect[619] and proceed as if no answer had been served. But he should do this only where the verification is clearly insufficient. If doubt exists, he should move to set aside the pleading.[620] If a pleading joined in by several parties not united in interest is verified only by one, the pleading is good as to the party verifying and cannot be returned, but the remedy of the party is to give notice that he requires an answer verified by all the parties.[621] The party whose pleading is returned has a reasonable opportunity, after the service of the notice and the return of the pleadings, to correct the error or supply the omission in time.[622] A motion to compel a party to make a proper verification is properly denied.[623]

Where an unverified pleading is served in a case where a verified pleading is required, the party may move to set aside or strike out the unverified pleading.[624] So if the defect in the verification is latent, a motion to set it aside is necessary.[625]

—— **Waiver of defects.** Failure to verify a pleading is an irregularity which may be waived by long delay,[626] and if a pleading is to be returned it should be done within twenty-four hours.[627] The objection for want of verification cannot be

615 Williams v. Empire Woolen Co., 7 App. Div. 345.

616 Webb v. Clark, 4 Super. Ct. (2 Sandf.) 647.

617 But see Lindheim v. Manhattan Ry. Co., 68 Hun, 122 which held that where the complaint is verified by one who has no interest in the action it should be dismissed.

618 Hamilton v. Gibbs, 18 Civ. Proc. R. (Browne) 211.

619 It is not enough to state that the pleading is returned "because not sufficiently verified." Snape v. Gilbert, 13 Hun, 494.

620 Wilkin v. Gilman, 13 How. Pr. 225.

621 Hull v. Ball, 14 How. Pr. 305.

622 Fusco v. Adams, 19 Civ. Proc. R. (Browne) 48.

623 Ralph v. Husson, 51 Super. Ct. (19 J. & S.) 515.

624 Fredericks v. Taylor, 52 N. Y. 596.

625 Gilmore v. Hempstead, 4 How. Pr. 153.

626 Wilson v. Bennett, 2 Civ. Proc. R. (Browne) 34.

627 A delay of five days is laches. Paddock v. Palmer, 32 Misc. 426.

urged on the trial.[628] The right to take advantage of a clerical error in the verification is waived by counsel stating in court that the pleading was verified.[629]

ART. VIII. CONSTRUCTION OF PLEADINGS.

(A) GENERAL CONSIDERATIONS.

§ 826. Common law as distinguished from Code rule.

It was a rule of the common law firmly established and constantly acted upon,—that, in examining and deciding all objections involving either form or substance, every pleading was

[628] Schwarz v. Oppold, 74 N. Y. 307.
[629] McMullen v. Peart, 23 State Rep. 323, 1 Silv. Sup. Ct. 161.

to be construed strongly against the pleader; nothing could be presumed in its favor; nothing could be added, or inferred, or supplied by implication, in order to sustain its sufficiency. This harsh doctrine, unnecessary and illogical in its original conception, and often pushed to extremes that were simply absurd, was the origin of the technicality and excessive precision, which, more than any other features, characterized the ancient system in its condition of highest development.[630] The Code provides that "the allegations of a pleading must be liberally construed, with a view to substantial justice between the parties."[631] This mode of interpretation does not require a leaning "in favor" of the pleader in place of the former tendency against him; it demands a natural spirit of fairness and equity in ascertaining the meaning of any particular averment or group of averments from their relation and connection with the entire pleading and from its general purpose and object.[632] Although pleadings are to be construed liberally, that does not necessarily mean that they shall be held to say what they do not, nor that words which have a fixed legal meaning, settled by the common law or statute, shall be enlarged or modified by an inaccurate popular use. Such use is apt to be shifting and variable; adequate for ordinary purposes, but not so stable or precise as to safely crowd out and take the place of legal definitions which furnish a more accurate and unvarying standard.[633]

A restricted meaning should not be given to words used, clearly susceptible of a more liberal construction, unless the whole pleading shows that the language was used in its restricted sense; especially so when such restricted interpretation would exclude a defense on the merits.[634] Where a matter is capable of different meanings that should be adopted

[630] Pom. Code Rem. p. 619; Prouty v. Whipple, 10 Wkly. Dig. 387; Berney v. Drexel. 33 Hun, 34.

[631] Code Civ. Proc. § 519.

For list of New York cases relating to construction of pleadings, see 10 Abb. Cyc. Dig. pp. 893-898.

[632] Pom. Code Rem. p. 619.

[633] Cook v. Warren, 88 N. Y. 37.

[634] Clare v. National City Bank, 35 Super. Ct. (3 J. & S.) 261, 14 Abb. Pr., N. S., 326.

which will support the pleading.[635] And ambiguous allegations in a pleading will be construed so as to support the pleading.[636] Of course, a rational rather than an absurd meaning will be given allegations, if possible. In other words, if under the averments pointing out the nature of the pleader's claim, the pleader will be entitled to give all the necessary evidence to establish the claim, then the pleading is sufficient.[637] This rule as to construction of pleadings applies to all pleadings whether interposed by plaintiff or defendant and also applies as well to an answer of usury as to one setting up any other defense.[638]

It should be noted, however, that this Code rule that pleadings shall be liberally construed, applies only to matters of form as distinguished from matters of substance.[639] Except in matters of form, the common law rule to construe doubtful pleadings most strongly against the pleader, still prevails; and when a pleading is susceptible of two meanings, that is taken which is most unfavorable to the pleader.[640] For instance, if the place where a transaction occurred is material to the cause of action, an ambiguity or uncertainty concerning it in a complaint, will be construed against the pleader.[641] So it would seem that where a material allegation is in the alternative, it will be taken in its weaker sense.[642] And if a material allegation is omitted, the presumption is against the existence of the matter; for the court may infer that the party

[635] Weber v. Huerstel, 11 Misc. 214, 66 State Rep. 564; Metzger v. Carr, 79 Hun, 258, 61 State Rep. 14, 29 N. Y. Supp. 410.

[636] Cook v. Warren, 88 N. Y. 37.

[637] Coatsworth v. Lehigh Valley Ry. Co., 156 N. Y. 451; Berney v. Drexel, 33 Hun, 34.

[638] Lewis v. Barton, 106 N. Y. 70, 8 State Rep. 546, 26 Wkly. Dig. 511.

[639] Clark v. Dillon, 97 N. Y. 370. This statement has been criticized on the ground that there are no real matters of form under our present pleadings.

[640] Bunge v. Koop, 48 N. Y. 225; Spear v. Downing, 34 Barb. 522, 12 Abb. Pr. 437, 22 How. Pr. 30; Dibblee v. Metcalf, 13 Misc. 136, 68 State Rep. 106; Farrell v. Amberg, 8 Misc. 220, 59 State Rep. 449, 23 Civ. Proc. R. (Browne) 434; Fahr v. Manhattan Ry. Co., 9 Misc. 57, 59 State Rep. 683.

[641] Beach v. Bay State Steamboat Co., 30 Barb. 433.

[642] Coon v. Froment, 25 App. Div. 250.

stated his defense as favorably as possible for himself.[643] Thus, where the complaint sets out a written contract complete in itself, and relies wholly upon a breach of it as constituting his cause of action, it cannot be presumed that he will, at the trial, produce other written evidence.[644]

§ 827. Implications must follow of necessity from facts stated, in order to be considered.

In the construction of pleadings, regard must be had to the facts stated, and pleading cannot be sustained upon implications, unless they of necessity follow from what has been alleged.[645] But what is necessarily understood or implied will be considered, since forming a part of the pleading. For instance, an allegation that certain officers duly leased lands, imports that the lands were such as they could legally lease.[646] So an allegation in an action by an assignee of assets of a corporation that after the transfer the company became insolvent and was dissolved, is an indirect statement that it was solvent when the transfer was made.[647] Likewise, in an action upon an undertaking given on the issue of an injunction, an allegation that the injunction was served imports a legal service.[648] And an allegation that a meeting was "duly convened," implies that it was regularly convened, and if necessary to its regularity, that it was an adjourned meeting.[649]

§ 828. Facts pleaded and not intention controls.

The facts pleaded will control notwithstanding the unexpressed intention of the pleader is to the contrary.[650]

§ 829. Construction of pleading as an entirety.

Pleadings must be construed as a whole. This rule is elementary and applies to all writings.[651]

[643] Hofheimer v. Campbell, 59 N. Y. 269; Neudecker v. Kohlberg, 81 N. Y. 296, 301.

[644] Winch v. Farmers' Loan & Trust Co., 12 Misc. 291.

[645] Magauran v. Tiffany, 62 How. Pr. 251.

[646] People v. City of New York, 28 Barb. 240, 8 Abb. Pr. 7, 17 How. Pr. 56.

[647] Nelson v. Eaton, 15 How. Pr. 305.

[648] Loomis v. Brown, 16 Barb. 325.

[649] People ex rel. Hawes v. Walker, 23 Barb. 304.

[650] Gould v. Glass, 19 Barb. 179.

[651] Fleischmann v. Bennett, 23 Hun, 200; Ryle v. Harrington, 4 Abb. Pr. 421, 14 How. Pr. 59.

§ 830. Construction as dependent on when attacked.

The decisions seem to bear out the statement that the strictness of construction decreases to a considerable extent in proportion as the lapse of time increases after the pleading is interposed. In other words, more liberality is exercised where the objection is raised by demurrer rather than by motion; still more where the objection is not raised until the trial; and even greater liberality where the objection is not raised until after verdict or judgment.

—— **Construction as against a demurrer.** This rule of liberal construction is applied when a pleading is attacked by a demurrer by holding that the pleading is deemed to allege that which by fair and reasonable intendment may be deduced from its averments;[652] that a cause of action will be deemed to be stated in a complaint whenever the requisite allegations can be fairly gathered from all the averments, though the statement of them may be argumentative and the pleading deficient in technical language;[653] and that a complaint which may reasonably import the averment of a good cause of action, is not to be held bad on demurrer, because its language is susceptible of a construction excluding any such cause.[654]

—— **Construction on the trial.** The rule of liberal construction applies to the construction of pleadings on the trial with more force than when objection is raised before trial by motion or demurrer.[655] It is only such defects in the complaint as are incurable that can be taken advantage of on the trial.[656]

—— **Construction to sustain verdict or judgment.** A liberal interpretation must be given to pleadings to sustain verdicts

[652] Marie v. Garrison, 83 N. Y. 14, 23; Savage v. City of Buffalo, 59 Hun, 606, 37 State Rep. 518; Beethoven Piano Organ Co. v. C. C. McEwen Co., 35 State Rep. 88; Cornwell v. Clement, 87 Hun, 50, 67 State Rep. 482; Feeley v. Wurster, 25 Misc. 544; Rosselle v. Klein, 42 App. Div. 316.

[653] Sanders v. Soutter, 126 N. Y. 193, 37 State Rep. 1; National Bank of Commerce v. Bank of New York, 17 Misc. 691.

[654] Olcott v. Carroll, 39 N. Y. 436.

[655] St. John v. Northrup, 23 Barb. 25; Read v. Lambert, 10 Abb. Pr., N. S., 428, 438.

[656] St. John v. Northrup, 23 Barb. 25; Read v. Lambert, 10 Abb. Pr., N. S., 428, 438.

and judgments when parties have not been misled to their prejudice, or injustice done,[657] and this rule applies to actions upon a statute.[658] Technical objections to a pleading are disregarded after verdict, where no motion is made to correct the pleading before verdict.

§ 831. Allegations in verified pleadings.

Unless the allegations or denials in a verified pleading are therein stated to be made upon the information and belief of the party, they must be regarded, for all purposes, as having been made upon the knowledge of the person verifying the pleading. And an allegation that the party has not sufficient knowledge or information, to form a belief, with respect to a matter, must, for the same purposes, be regarded as an allegation that the person verifying the pleading has not such knowledge or information.[659] This Code provision applies to all pleadings, the answer as well as the complaint, and to denials in the answer as well as affirmative defenses or counterclaims.[660]

§ 832. Aids in interpretation.

Neither the summons[661] nor the verification[662] can be resorted to in order to help construe a pleading. But the complaint and answer must be construed together in determining whether the facts disclose a defense to the action,[663] and where defendant has set up a counterclaim to which the plaintiff has replied, the complaint and reply are to be construed together in determining whether a cause of action is set forth.[664] And the demand for judgment may be consulted to determine the nature of the cause of action intended.[665]

657 Graves v. Waite, 59 N. Y. 156.
658 Dempsey v. Willett, 16 Hun, 264.
659 Code Civ. Proc. § 524.
660 Bennett v. Leeds Mfg. Co., 110 N. Y. 150.
661 Graves v. Waite, 59 N. Y. 156.
662 Nickerson v. Canton Marble Co., 35 App. Div. 111.
663 Munger v. Shannon, 61 N. Y. 251.
664 Deeves v. Metropolitan Realty Co., 25 Civ. Proc. R. (Scott) 276.
665 Randall v. Van Wagenen, 115 N. Y. 527.

§ 833. Inconsistency between allegations in different counts.

Where a separate count in a complaint in terms repeats and realleges the allegations contained in a former count, and there is an inconsistency between the allegations so repeated and those stated in the latter count, the latter must be adopted as containing the statements intended to be relied on by the pleader.[666]

§ 834. General as against specific statements.

A specific statement of facts will control a general statement.[667]

§ 835. Title vs. body of pleading.

The character in which a party is charged in the allegations of the pleading, is to control, in testing the pleading on demurrer, rather than the description of him in the title.[668]

§ 836. Allegations in pleadings vs. exhibits.

Allegations in a complaint as to the legal effect of a contract, will not control where the contract is annexed to and forms part of the complaint. Such legal effect must be gathered from the contract itself, and not from the allegations in such complaint.[669]

§ 837. Time to which allegations relate.

Allegations in pleadings will be construed to refer to the time of commencement of the action where no other time is mentioned.[670] Thus an allegation in a complaint that "plaintiff and defendant are residents," has reference to the time of the commencement of the action.[671] If the complaint is verified, allegations in the present tense must be deemed as relating to the date of verification.[672] And an allegation in a

[666] Bogardus v. New York Life Ins. Co., 101 N. Y. 328.
[667] Lange v. Benedict, 73 N. Y. 12, 24; Clark v. Bowe, 60 How. Pr. 98.
[668] Christy v. Libby, 35 How. Pr. 119.
[669] Black v. Homeopathic Mut. Life. Ins. Co., 47 Hun, 210.
[670] Townshend v. Norris, 7 Hun, 239.
[671] Burns v. O'Neil, 10 Hun, 494.
[672] Prindle v. Caruthers, 15 N. Y. 425; Scott v. Royal Exch. Shipping Co., 5 Month. Law Bul. 64; Sussman v. Mason, 10 Misc. 20.

verified answer, in the present tense, does not avail defendant as an allegation relating to the time of the transactions mentioned in the complaint.[673]

§ 838. Clerical errors.

A clerical error in a pleading does not nullify former allegations, under the rule requiring pleadings to be construed with a view to substantial justice between the parties.[674]

(B) ADMISSIONS IN PLEADINGS.

§ 839. Admissions considered generally.

Admissions in pleading are of two kinds—express and implied. The one occurs where an allegation in a preceding pleading is in terms admitted to be true by an averment in a subsequent pleading; the other occurs when there is a failure to deny a material allegation in a preceding pleading. Furthermore, the use of admissions in pleadings must be distinguished as admissions defining the issues to be tried, i. e., admissions of record of which the court will take notice, and as admissions introduced in evidence for the consideration of the jury. The latter phase of the question will not be considered in this connection.[675]

§ 840. Admissions by failure to deny.

The Code provides that "each material allegation of the complaint not controverted by the answer, and each material allegation of new matter in the answer not controverted by the reply where a reply is required, must, for the purposes of the action, be taken as true. But an allegation of new matter in the answer to which a reply is not required, or of new matter in a reply, is to be deemed controverted by the ad-

[673] Coulson v. Whiting, 12 Daly, 408.

[674] McCarron v. Cahill, 15 Abb. N. C. 282, 1 How. Pr., N. S., 305; Kenney v. New York Cent. & H. R. R. Co., 15 Civ. Proc. R. (Browne) 347, 49 Hun, 535, 18 State Rep. 441; Roussel v. St. Nicholas Ins. Co., 41 Super. Ct. (9 J. & S.) 279.

[675] For a note on admissions in pleadings as evidence, see 23 Abb. N. C. 394.

verse party, by traverse or avoidance, as the case requires."[676] It will be noted that it is only every "material" allegation not controverted that is taken to be true.[677] Every averment is material unless it may be struck out as surplusage.[678] No allegation in a complaint or answer can be deemed material unless an issue taken upon it, whether of law or fact, will decide the cause, so far as relates to the particular cause of action to which it refers.[679] No allegations in a complaint are "material," which will not prevent a plaintiff from recovering if proved to be untrue, or which, when denied, he is not obliged to prove to entitle himself to a verdict.[680] Immaterial, indefinite and irrelevant matters are not admitted by failure to deny[681] nor are conclusions of law[682] or matters of law[683] or mere inferences.[684] So where a title averred itself is defective, or where in truth none is averred, the title is not admitted by failure to deny.[685] But unnecessary allegations in a complaint are admitted, when made material by new matter in an answer which does not deny such allegations.[686]

In applying these general rules it has been held that a plea

[676] Code Civ. Proc. § 522. As to when a reply is required, see post, § 883.

See, also, Commercial Bank of Keokuk v. Pfeiffer, 108 N. Y. 242, 28 Wkly. Dig. 335, 13 State Rep. 506; City of Brooklyn v. Copeland, 106 N. Y. 496, 27 Wkly. Dig. 225, 11 State Rep. 206.

[677] Sands v. St. John, 36 Barb. 628, 23 How. Pr. 140.

[678] City of Albany v. Cunliff, 2 N. Y. (2 Comst.) 165.

[679] Newman v. Otto, 6 Super. Ct. (4 Sandf.) 668, Code R., N. S., 184, note, 10 N. Y. Leg. Obs. 14.

[680] Oechs v. Cook, 10 Super. Ct. (3 Duer) 161.

[681] Sands v. St. John, 36 Barb. 628; Tennant v. Guy, 19 State Rep. 667; De Graaf v. Wyckoff, 13 Daly, 366.

[682] Farrell v. Amberg, 8 Misc. 220; Cutting v. Lincoln, 9 Abb. Pr., N. S., 436; Alamango v. Board Sup'rs of Albany County, 25 Hun, 551.

[683] People ex rel. Purdy v. Commissioners of Highways of Town of Marlborough, 54 N. Y. 276, 13 Am. Rep. 581.

[684] An affirmative allegation which, if uncontroverted, is to be taken as true, should be direct and positive. One which at most merely implies a fact, or justifies an inference that such is or will be claimed to be the fact, should not be construed as a material allegation. West v. American Exch. Bank, 44 Barb. 175.

[685] Boyce v. Brown, 7 Barb. 80.

[686] Hopkins v. Ward, 67 Barb. 452.

of tender operates as an unequivocal admission that the sum named is due, except where the contract between the parties under which the sum is claimed to be due is invalid.[687] So the capacity of the plaintiffs, as executors, to sue, if averred in the complaint, and not denied in the answer, must be taken as admitted.[688] Likewise, allegations in a complaint on a policy of fire insurance as to the conditions thereof, not denied in the answer, must be taken to be established.[689] And a denial that defendants "are indebted in any sum whatever upon the alleged cause of action set forth in the complaint," admits the sale and delivery and defendants' promise to pay.[690] So a special plea admits the matters stated in the complaint.[691] And no proof can be admitted in support of new matter contained in the answer which is inconsistent with an allegation in the complaint which is not denied.[692] But in an action arising out of a tort and sounding in damages, the defendant, by failing to deny the amount of damages alleged to have been sustained, does not admit them, and the plaintiff must prove the amount sustained by him or he will be entitled only to nominal damages.[693] And it does not follow that because defendant makes no denial of any allegation in the complaint, this is such an admission of the cause of action that a judgment contrary to the admission is erroneous, if affirmative matter of defense is stated.[694]

—— **Indirect denials.** Where material allegations in a complaint are not directly denied, the statement in the answer of other facts inconsistent with them, will not be construed as a denial so as to prevent them from being taken as true. Merely making a counter-statement, or giving a different version of the matter from that in the complaint, without denying the

687 Breunich v. Weselmann, 49 Super. Ct. (17 J. & S.) 31.

688 Dart v. Farmers' Bank at Bridgeport, 27 Barb. 337.

689 Martin v. Rochester German Ins. Co., 86 Hun, 35, 67 State Rep. 237, 33 N. Y. Supp. 404.

690 Lamb v. Hirschberg, 1 Misc. 108, 48 State Rep. 658.

691 Gregory v. Trainer, 1 Abb. Pr. 209, 4 E. D. Smith, 58.

692 Alexander Lumber Co. v. Abrahams, 19 Misc. 425, 77 State Rep. 1139, 43 N. Y. Supp. 1139.

693 Howell v. Bennett, 74 Hun, 555.

694 Newell v. Doty, 33 N. Y. 83.

See, also, Ferris v. Hard, 135 N. Y. 354, 48 State Rep. 514

allegations therein, is not specifically controverting such allegations.[695]

—— **Admissions in separate answers.** Where defendant interposes several answers, an admission implied in one answer, by a neglect to deny an allegation of the complaint, only admits such allegation for the purposes of that answer, and is not available under another answer.[696]

§ 841. Express admissions.

An express admission of an allegation is conclusive against the party admitting, in so far as the issues are concerned, unless the admission is gotten rid of by amendment. But an admission, in order to be conclusive, must be clear, and not vague or ambiguous, as where preceded by an express denial.[697]

—— **Construction.** Where a party desires to avail himself of an admission or allegation in his opponent's pleadings, he must accept the admission or allegation as an entirety.[698] The pleading must be read as an entirety.[699] For instance, the plaintiff cannot accept an admission in the answer which is coupled with an affirmative allegation, without accepting also the qualification.[700] So a general denial may overcome the effect of an express admission in a special plea.[701] But though an admission in pleading, when relied on by the adverse party, must be construed in connection with a statement of another fact nullifying the effect of the admission, yet the party may disprove the fact nullifying the admission, and so far as disproved it is of no avail.[702] And furthermore while a plaintiff must take all the admissions in each defense together, he

695 Wood v. Whiting, 21 Barb. 190; Fleischmann v. Stern, 90 N. Y. 110.

696 Swift v. Kingsley, 24 Barb. 541.

697 Brady v. Hutkoff, 13 Misc. 515, 69 State Rep. 113.

698 Shrady v. Shrady, 42 App. Div. 9; Gildersleeve v. Landon, 73 N. Y. 609; Goodyear v. De La Vergne, 10 Hun, 537.

699 Hall v. Brennan, 64 Hun, 394, 46 State Rep. 777.

700 Vanderbilt v. Schreyer, 21 Hun, 537; Oakley v. Oakley, 69 Hun, 121, 53 State Rep. 326.

701 De Waltoff v. Third Ave. R. Co., 75 App. Div. 351.

702 Gildersleeve v. Landon, 73 N. Y. 609; Cromwell v. Hughes, 12 Misc. 372, 65 State Rep. 777.

is not obliged to accept all the admissions made in separate defenses together.[703]

An admission in an answer of an allegation of the complaint is not limited to the time of the answer, but must be construed in reference to the complaint, and as broadly as the allegation therein.[704] But an admission in an answer will not be construed as broader than the allegation of the complaint.[705] An admission will be construed as including matters necessarily implied therefrom. For instance, an admission that A. "executed" the deed to defendant, is, in effect, an admission that the deed was sealed, signed, and delivered.[706]

§ 842. Effect of admissions.

An admission, in so far as the opposing party is concerned, dispenses with the necessity of proving the allegations so admitted.[707] On the other hand, as to the party making the direct or implied admission, he is precluded from offering evidence to contradict the admissions in his pleading.[708] And this latter rule is not affected by the fact that plaintiffs have voluntarily gone beyond these admissions and opened up the inquiry.[709] If an answer admits making the contract or note sued upon, it is admissible in evidence, notwithstanding defects in its execution.[710]

An allegation expressly admitted must be taken as true

[703] Hoes v. Nagele, 28 App. Div. 374.

[704] Legrand v. Manhattan Mercantile Ass'n, 80 N. Y. 638.

[705] National City Bank v. Westcott, 118 N. Y. 468, 29 State Rep. 806.

[706] Thorp v. Keokuk Coal Co., 48 N. Y. 253.

[707] Sturgis v. New Jersey Steam Nav. Co., 35 Super. Ct. (3 J. & S.) 251. In an action brought on a covenant in a lease, a copy of which is set out in the complaint, an admission of the execution of the covenant makes it unnecessary to produce the lease in evidence. Travis v. Ehlers, 84 Hun, 427, 65 State Rep. 575.

[708] Crosbie v. Leary, 19 Super. Ct. (6 Bosw.) 312.

So evidence indirectly controverting the admission should not be allowed. Robbins v. Richardson, 15 Super. Ct. (2 Bosw.) 248.

Inconsistent facts cannot be proven. Fleischmann v. Stern, 90 N. Y. 110.

[709] Paige v. Willet, 38 N. Y. 28.

[710] Smith v. City of Athens, 74 Hun, 26, 57 State Rep. 743; Leonard v. Crow, 22 Misc. 516.

"for all the purposes of the action."[711] There is no issue as to the matters admitted and hence they should not be submitted to the jury.[712]

——**Waiver of right to insist on admission.** It seems that the fact that plaintiff has unsuccessfully attempted to prove what is admitted by defendant's answer, does not deprive him of the benefit of the admission in the answer.[713] And where a complaint states items of account amounting to a certain sum, and admits payment of a less sum, defendant has a right to the benefit of such admission, though he attacks the correctness of the items of account.[714] But if notwithstanding the existence of a judgment relied on for the relief sought is admitted by the answer, plaintiff proceeds to put it in evidence, and it is void on its face, the court will treat it as forming no ground for plaintiff's action.[715] If evidence is offered by a party which contradicts an admission in his pleading, it may be objected to at the time but cannot be objected to later when the witness desires to explain the contradiction.[716]

§ 843. Amendments or withdrawal of pleading as affecting admissions.

The effect of an express or implied admission may be entirely overcome by an amendment. For instance, where an amended answer is served, its denial of allegations in the complaint supersedes admissions by not denying in the original answer.[717] So where, in an original answer, a fact is admitted and an amended answer is served which contains no such admission, the defendant is not bound by the admission in the absence of proof of it as evidence.[718]

And it would seem that if a pleading is withdrawn, any ad-

711 Meagher v. Life Union, 65 Hun, 354, 47 State Rep. 588.
712 Browne v. Stecher Lithographic Co., 24 App. Div. 480.
713 Potter v. Smith, 70 N. Y. 299. See, also, note in 23 Abb. N. C. 396.
714 White v. Smith, 46 N. Y. 418.
715 Ely v. Cook, 2 Hilt. 406, 9 Abb. Pr. 366.
716 Ferris v. Hard, 135 N. Y. 354.
717 Lincoln Nat. Bank v. Butler, 14 Misc. 464, 76 State Rep. 261.
718 Houghtaling v. Lloyd, 39 State Rep. 580, 21 Civ. Proc. R. (Browne) 56, 15 N. Y. Supp. 424.

missions, direct or implied, contained therein, are thereby withdrawn in so far as the issues are concerned.[719]

ART. IX. RETURNING PLEADINGS.

§ 844. General rules.

The remedy for all merely formal defects in a pleading, such as failure to subscribe the pleading or to number the folios, is to return the pleading with notice of the defect.[720] But a party has the right to have the question, whether his adversary's pleading has been made and served according to law so as to become a pleading in the case, determined upon a motion to strike it out, and is not obliged to assume the peril of having his subsequent proceedings set aside if he returns the pleading and takes subsequent steps in the case.[721] And failure to return a pleading does not waive the irregularity of service thereof on an unauthorized person.[722] A pleading must be returned promptly,[723] though it would seem that a party receiving a pleading has, at least, the whole of the same day to return it.[724] The irregularity must be pointed out,[725] but failure to specify a ground of irregularity does not necessarily waive such ground.[726] The return should be to the attorney, except where the papers served have no attorney's name on them in which case they may be returned to the party.[727] The pleading need not be returned a second time.[728] If a party has accepted a pleading and given notice of a motion for judgment thereon, he cannot return an amended answer there-

719 See Merchants' Nat. Bank v. Barnes, 32 App. Div. 92.

720 Strauss v. Parker, 9 How. Pr. 342; Anderson v. Gurlay, 4 Month. Law Bul. 18; Rule 19 of General Rules of Practice.

721 Fredericks v. Taylor, 52 N. Y. 596, 14 Abb. Pr., N. S., 77.

722 Durham v. Chapin, 13 App. Div. 94.

723 Levi v. Jakeways, 4 How. Pr. 126, 2 Code R. 69.

724 McGown v. Leavenworth, 2 E. D. Smith, 24.

725 White v. Cummings, Code R., N. S., 107, 5 Super. Ct. (3 Sandf.) 716; Broadway Bank v. Danforth, 7 How. Pr. 264; Snape v. Gilbert, 13 Hun, 494; Schreyer v. Dooley, 1 Month. Law Bul. 73; White v. Cummings, 5 Super. Ct. (3 Sandf.) 716, Code R., N. S., 107.

726 Philips v. Prescott, 9 How. Pr. 430.

727 Taylor v. City of New York, 11 Abb. Pr. 255.

728 Jacobs v. Marshall, 13 Super. Ct. (6 Duer) 689; Richardson v. Brooklyn City & N. R. Co., 22 How. Pr. 368.

er served on the ground that the first paper served was not answer.[729]

A party, whose pleading is returned, may move to require it be received; he is not bound to wait till after judgment.[730]

[9] Howard v. Curran, 8 Civ. Proc. R. (Browne) 262.
[0] Pattison v. O'Connor, 23 Hun, 307.

CHAPTER II.

THE COMPLAINT.

§ 845. Scope of chapter.

In chapter one of this part, the general rules relating to pleadings have been briefly stated and as they apply equally well to all pleadings they will not be reiterated. Subsequent chapters which will be devoted to particular actions or proceedings and to actions or proceedings by or against particular persons, will include questions of pleading peculiar thereto which will not now be noticed. This chapter will include merely the general rules peculiarly applicable to complaints in general as distinguished from other pleadings.

§ 846. Contents of complaint as fixed by Code.

The first pleading on the part of the plaintiff is the com-

plaint[1] which must contain the following items:

1. The title of the action which includes (a) the name of the court in which brought; (b) if brought in the supreme court the name of the county which plaintiff designates as the place of the trial; (c) the names of all the parties to the action, plaintiff and defendant.

2. A plain and concise statement of the facts, suit or cause of action, without unnecessary repetition.

3. A demand of the judgment to which the plaintiff supposes himself entitled.[2]

§ 847. Title.

The commencement of a complaint is its title which "must"[3] contain (a) the name of the court in which the action is brought, (b) the name of the county which plaintiff designates as the place of trial, if the action is in the supreme court, and (c) the names of all the parties to the action, plaintiff and defendant.[4]

The following is the common form:

Supreme Court, County of ———,
[Names of all the plaintiffs],
plaintiffs,
against
[Names of all the defendants],
defendants.

—— **Name of court.** The name of the court must be given whether or not it is set forth in the summons.[5]

—— **Name of county.** The name of the county designated as the place of trial, is required only where the action is brought in the supreme court, inasmuch as such a designation would be useless in actions brought in a local court, such as a city court,

[1] Code Civ. Proc. § 478.

[2] Code Civ. Proc. § 481.

[3] The old code used the word "sball" but the word "must" was inserted instead of "shall," according to Mr. Throop, to overrule certain cases in which it had been held that the name of the court need not be inserted in the complaint if it appeared in the summons.

[4] Code Civ. Proc. § 478.

[5] The rule under the old Code was to the contrary. Van Namee v. Peoble, 9 How. Pr. 198; followed Van Benthuysen v. Stevens, 14 How. Pr. 70.

which must necessarily be tried in the county where the court is situated. The place of trial stated in the complaint, though different from the place designated in the summons, controls,[6] and determines not only where the trial is to be had but also where all preliminary motions are to be made.[7] The omission of the name of the county is not cured by the fact that it appears in the summons,[8] and makes the complaint subject to a motion to strike it out, though an amendment may be allowed to defeat the motion.[9] The objection is not waived by failure to urge it until after the time to answer has expired or by obtaining orders extending the time to answer.[10]

—— **Names of parties.** The names of "all" the parties, both plaintiff and defendant, must be specified, and hence it is insufficient to set forth the names of merely a part of the plaintiffs or a part of the defendants, and where a partnership sues or is sued, the full names of all the parties together with the firm name must ordinarily be stated.[11] As before stated in the chapter relating to the summons,[12] initials should not be used in place of the given name though the middle name may be represented by an initial. Where defendant has two names, by one of which he is as well known as by the other, he may be sued in either.[13] If a party plaintiff is an infant, use phrase "X, an infant, by A., his guardian ad litem;" but if an infant is defendant use the infant's name. If a party is a corporation, the full name by which incorporated should be used. If a married woman is sued alone, use her given name together with the family name acquired by marriage; if sued with her husband it is common practice to use the phrase "John Jones and Mary, his wife." If divorced, use the surname acquired by marriage unless she has resumed her maiden name.

[6] Fisher v. Ogden, 12 App. Div. 602.

[7] Merrill v. Grinnell, 10 How. Pr. 31.

[8] Hotchkiss v. Crocker, 15 How. Pr. 336.

[9] Hotchkiss v. Crocker, 15 How. Pr. 336; Merrill v. Grinnell, 10 How, Pr. 31.

[10] Merrill v. Grinnell, 10 How. Pr. 31.

[11] A subsequent chapter on "actions by, against, and between, partners," will treat of this matter in detail.

[12] See ante, pp. 715, 716.

[13] Eagleston v. Son, 28 Super. Ct. (5 Rob.) 640; Isaacs v. Mintz, 16 Daly, 468, 34 State Rep. 758; Anderson v. Horn, 23 Abb. N. C. 475.

The rules as to the mode of pleading where defendant's name is unknown in whole or in part or where plaintiff demands judgment against an unknown person, as laid down by the Code,[14] have already been considered in connection with the discussion as to the form of the summons.[15] Suffice it to repeat in this connection that a fictitious name for defendant can be used only when plaintiff is ignorant of the true name,[16] and that the true name should be substituted when discovered.[17] So if a fictitious name is adopted in the complaint there must be a distinct allegation to the effect that the name so sued is by reason of ignorance of defendant's true name.[18] The Code rule does not permit the use of such a name merely as an expedient to cover the case of one whose name is known, who is not sued or intended to be sued at the outset, and thus permit him to be brought in, in case the plaintiff discovers, at some later period, that he should have been made a defendant.[19] In describing a person whose name is unknown it is sufficient to use such a phrase as "the man in command of the sloop Hornet."[20] If a defendant is unknown, it is proper to allege the facts somewhat like this: "All persons unknown having or claiming an interest in the premises described in the complaint, such unknown persons or owners being herein described as the wife, widow, heirs at law, devisees, grantees, assignees, or next of kin, if any, of said defendant * * *, and their respective husbands and wives, if any,[21] all of whom and whose names, except as stated, are unknown to plaintiff."

If a party sues or is sued in a representative capacity, the fact must be shown either in the caption or in the body of the complaint, and the proper mode of showing such fact is by the use of the word "as,"[22] since if the name of the party is im-

14 Code Civ. Proc. § 451.

15 See ante, pp. 717, 718.

16 Crandall v. Beach, 7 How. Pr. 271.

17 McCabe v. Doe, 2 E. D. Smith, 64.

18 Gardner v. Kraft, 52 How. Pr. 499.

19 Town of Hancock v. First Nat. Bank of Oxford, 93 N. Y. 82.

20 Pindar v. Black, 4 How. Pr. 95.

21 Moran v. Conoma, 36 State Rep. 680; Wheeler v. Scully, 50 N. Y. 667.

22 Griswold v. Watkins, 20 Hun, 114; Buyce v. Buyce, 48 Hun, 433.

mediately followed by the name of his office, without the use of the word "as" or its equivalent, the name of the office will be regarded merely as descriptio personae,[23] though if the body of the complaint clearly discloses that the action is by or against a person in a representative capacity, the omission of the word "as" is immaterial.[24] On the other hand the use of the word "as" is not conclusive and may be regarded as merely descriptive.[25] This rule as to suing in a representative capacity applies to administrators and executors, assignees, receivers, public officers, guardians, etc. Thus, an action by a public officer should be brought in his individual name, with the addition of his name of office. An action in the name of office merely, e. g. by "the supervisors of A.," cannot be maintained.[26]

Where an action is brought or defended by one in behalf of several, on the Code ground either that (a) the question is one of a common or general interest of many persons, or that (b) the persons who might be made parties are very numerous and it may be impracticable to bring them all before the court,[27] the complaint must allege the facts within the one case or the other as the reason for not making all the persons parties.[28]

[23] Litchfield v. Flint, 104 N. Y. 543; Bonesteel v. Garlinghouse, 60 Barb. 338; Merritt v. Seaman, 6 N. Y. (2 Seld.) 168; Sheldon v. Hoy, 11 How. Pr. 11.

[24] Smith v. Levinus, 8 N. Y. (4 Seld.) 472; Watrous v. Shear, 25 Wkly. Dig. 164; Fowler v. Westervelt, 40 Barb. 374.

But where the scope and averments of the complaint harmonize with the omission, the action will be considered as against the defendants individually. Bennett v. Whitney, 94 N. Y. 302; distinguishing Beers v. Shannon, 73 N. Y. 292.

And where a defendant sued by his individual name with the addition "receiver" appears generally by attorney who describes him in the notice of appearance "as receiver," he will be deemed to have been properly brought in his representative capacity. Graham v. Lawyers' Title Ins. Co., 20 App. Div. 440; distinguishing Landon v. Townshend, 112 N. Y. 93, 20 State Rep. 223, 16 Civ. Proc. R. (Browne) 161.

[25] Albany Brewing Co. v. Barckley, 42 App. Div. 335; Lehman v. Koch, 30 State Rep. 224, 18 Civ. Proc. R. (Browne) 301.

Contra,—Farrington v. American Loan & Trust Co., 18 Civ. Proc. R. (Browne) 135.

[26] Supervisors of Town of Galway v. Stimson, 4 Hill, 136.

[27] Code Civ. Proc. § 448.

[28] Garner v. Wright, 24 How. Pr. 144.

If one sues on behalf of all, he must distinctly state in his complaint that he sues as well on behalf of himself as of all others equally interested,[29] though it is sufficient to state that the plaintiffs sue for the benefit of those interested who may "come in and contribute to the expenses."[30] It would seem the better practice to include this statement in the complaint and summons,[31] though it has been held sufficient where in the body of the complaint.

§ 848. Statement of cause of action.

After the title comes the statement of the facts constituting the cause of action "in a plain and concise form, without unnecessary repetition."[32] What constitutes a plain and concise statement without unnecessary repetition has been already considered in connection with the general rules of pleading.[33] The "facts" constituting the "cause of action" must be stated. Facts extrinsic to the cause of action, such as relied on as a ground of arrest, should not be alleged.[34] The "cause of action" consists of the primary right and duty of the respective parties, together with the wrongful act or omission by which they are violated or broken.[35] Therefore the complaint should contain (a) the facts which are the occasion of the primary right and duty, and (b) the facts which constitute the defendant's wrongful act or omission. A statement of the primary legal right and duty without the facts to which they apply, is insufficient, while such a statement in addition to those facts is surplusage.[36] But where the facts on which the primary right and duty of the parties depend, are in accordance with the universal experience of mankind and must therefore be presumed to exist, as in actions for personal injuries such as assault and battery, such facts may be omitted.[37] As before

[29] Smith v. Lockwood, Code R., N. S., 319, 10 N. Y. Leg. Obs. 12; Wood v. Draper, 24 Barb. 187, 4 Abb. Pr. 322.
[30] Dennis v. Kennedy, 19 Barb. 517.
[31] Cochran v. American Opera Co., 20 Abb. N. C. 114.
[32] Code Civ. Proc. § 481, subd. 2.
[33] See ante, § 795.
[34] Elwood v. Gardner, 45 N. Y. 349.
[35] Pom. Code Rem. p. 584.
[36] Pom. Code Rem. p. 589.
[37] Pom. Code Rem. p. 589.

stated, the issuable facts and not the mere evidence of the facts going to make up the cause of action must be stated, while on the other hand the issuable facts must be alleged as they actually existed or occurred, and not their legal effect, force, or operation.[38]

The allegations in the body of the complaint control the title and the names of the parties, after being given in the title, need not be repeated in the body of the complaint, it being sufficient to refer to the parties as plaintiffs or defendants.[39]

The complaint must show the right to sue.[40] It must show a cause of action in the plaintiff as distinguished from a third person.[41] For instance, if title in plaintiff is necessary to enable him to sue, as in ejectment, such title must be alleged. So if the plaintiff sues in a representative capacity, he should show his capacity to sue. For instance if a guardian sues on behalf of his ward it is not enough to merely describe himself as such but it is necessary to show the appointment.[42] So the complaint in an action by a receiver must allege his authority to sue,[43] except where he sues by virtue of a contract made with him as receiver,[44] and it is not sufficient that he allege generally that he was appointed receiver,[45] it being necessary that he at least state the place of his appointment and distinctly aver that he has been appointed by an order of court.[46] In other words while it is not necessary to set out all the pro-

[38] This rule does away with the necessity of averring a promise where the action is based on an implied contract. However, as has been seen, this rule is not strictly adhered to inasmuch as the use of the common counts is still held proper. So, contracts may be set out in haec verba or according to their legal effect.

[39] Stanley v. Chappell, 8 Cow. 235.

[40] So if leave of court is necessary, as where a receiver sues, such leave must be alleged. Morgan v. Bucki, 30 Misc. 245.

[41] Weichsel v. Spear, 47 Super. Ct. (15 J. & S.) 223.

[42] Hulbert v. Young, 13 How. Pr. 413; Grantman v. Thrall, 44 Barb 173.

[43] Bangs v. McIntosh, 23 Barb. 591.

[44] White v. Joy, 13 N. Y. (3 Kern.) 83.

[45] Coope v. Bowles, 42 Barb. 87, 18 Abb. Pr. 442, 28 How. Pr. 10.

[46] Gillet v. Fairchild, 4 Denio, 80; White v. Low, 7 Barb. 204.

ceedings by which he was appointed,[47] yet he must state the time and mode of his appointment.[48] It is sufficient to allege that on the ——— day of ———, at the city of ———, on an application made by ———, and by an order then made by ———, the plaintiff was duly appointed receiver of the property of ———.[49] It need not aver that the order of appointment was filed and recorded, where it is alleged that the receiver's bond was approved and filed.[50]

Compliance with conditions precedent to recovery must be alleged in the complaint and this rule is often applied where an action is forbidden by statute until the performance of certain acts such as presentation of the demand within a specified time where the action is against a municipal corporation or against executors or administrators. For instance, where an action can only be brought by leave of court the complaint must show that such leave has been obtained.[51] The statutory mode of pleading conditions precedent where the action is based on an instrument for the payment of money only, has already been considered.[52]

Where a copy of the instrument declared on is set out in the complaint, and it purports to be for value received, or shows mutual promises, that is a sufficient allegation of consideration.[53]

If the court is a court of limited jurisdiction, the complaint must allege the facts necessary to show the jurisdiction of the court.[54] Thus, in an action in a county court to recover a mon-

[47] Stewart v. Beebe, 28 Barb. 34. Compare Crowell v. Church, 7 Abb. Pr. 205, note.

[48] Dayton v. Connah, 18 How. Pr. 326.

[49] An amendment on the trial of the allegation that, by an order made by a judge of the supreme court, etc., he "was appointed" receiver, by inserting the word "duly," has been held to remedy any defect in the allegation and to enable him to prove all the facts giving jurisdiction. Rockwell v. Merwin, 45 N. Y. 166.

[50] Scroggs v. Palmer, 66 Barb. 505.

[51] United States Life Ins. Co. v. Gage, 17 State Rep. 762; Hauselt v. Fine, 18 Abb. N. C. 144.

[52] See ante, pp. 852-855.

[53] Spear v. Downing, 34 Barb. 522, 12 Abb. Pr. 437, 22 How. Pr. 30; Meyer v. Hibsher, 47 N. Y. 265; Wood v. Knight, 35 App. Div. 21.

[54] Frees v. Ford, 6 N. Y. (2 Seld.) 176; John W. Simmons Co. v. Costello, 63 App. Div. 428.

ey judgment, an averment in the complaint that the defendant is a resident of the county is necessary.[55]

If persons who are apparently necessary parties are not joined, the complaint must show the reason for not joining them as parties.[56]

General damages need not be pleaded but special damages, i. e., those which are the natural but not the necessary result of the injury complained of, must be specially alleged.

As before stated,[57] a single cause of action should not ordinarily be stated in several counts. But a separate numbering of the paragraphs where only a single cause of action is intended to be set up, does not vitiate the pleading.[58]

A defect in the complaint may be supplied by the allegations of the answer[59] but the denial of a fact omitted from the complaint does not supply the omission.[60]

The cause of action set forth will be construed as based on contract rather than on tort, where the question is in doubt.[61]

—— **Anticipating defense.** The complaint need not anticipate and deny a possible defense.[62] Thus, a complaint need not contain averments of facts necessary to avoid the statute of limitations[63] or the statute of frauds.[64] So where a defense

[55] Gilbert v. York, 111 N. Y. 544. See, also, Peck v. Dickey, 5 Misc. 95, which recognizes general rule.

[56] Coster v. New York & E. R. Co., 3 Abb. Pr. 332, 13 Super. Ct. (6 Duer) 43.

[57] See ante, p. 837.

[58] Waite v. Sabel, 44 App. Div. 634, 62 N. Y. Supp. 419.

[59] Strauss v. Trotter, 6 Misc. 77, 55 State Rep. 489; White v. Joy, 13 N. Y. (3 Kern.) 83; Cohu v. Husson, 113 N. Y. 662.

[60] Dibblee v. Metcalf, 13 Misc. 136, 68 State Rep. 106; Tooker v. Arnoux, 76 N. Y. 397; Forker v. Brown, 10 Misc. 161, 62 State Rep. 480.

[61] Foote v. Ffoulke, 55 App. Div. 617.

[62] Cahen v. Continental Life Ins. Co., 69 N. Y. 300; Sherff v. Jacobi, 71 Hun, 391; Van Nest v. Talmage, 17 Abb. Pr. 99; Metropolitan Life Ins. Co. v. Meeker, 85 N. Y. 614.

So held in actions against stockholders of corporations. Rowell v. Janvrin, 151 N. Y. 60; Wheeler v. Millar, 90 N. Y. 353.

However, a complaint must plead nonpayment though payment is a defense. Lent v. New York & M. Ry. Co., 130 N. Y. 504; Newton v. Browne, 6 Misc. 603.

For note on this question, see 25 Abb. N. C. 120.

[63] Minzesheimer v. Bruns, 1 App. Div. 324; Reilly v. Sabater, 26 Civ. Proc. R. (Scott) 34; Butler v. Mason, 5 Abb. Pr. 40.

was that plaintiff was not the real party in interest, plaintiff was not bound to anticipate it by alleging a reassignment to him of the claim sued on.[65] And where a liability would arise upon a contract but for the operation of an exemption therein, he who asserts the liability need not plead that the exemption does not apply.[66]

—— **Statement of two or more separate causes of action.** If the complaint sets forth two or more causes of action, the statement of the facts constituting each cause of action must be separated and numbered.[67] Furthermore, each separate cause of action should begin with appropriate words to designate it as such.[68] But this rule applies only to cases where the court can see from the pleading itself that more than one cause of action or defense is relied on.[69] Each statement of a separate cause of action must be complete within itself, unless distinctly connected with another cause of action by appropriate words,[70] except as to matters of mere inducement, which need not be repeated in the statement of each cause of action,[71] and except that one demand for judgment at the end of the complaint suffices.[72] The proper mode of commencing separate causes of action is to begin with such words as "I. For a first separate and distinct cause of action"; "II. For a second separate and distinct cause of action." It is not sufficient to separate the causes of action in a bill of particulars annexed to the complaint,[73] but it is sufficient if two causes of action are separately numbered in the complaint, although the second cause is stated in a paragraph numbered five.[74] Failure to

[64] Marston v. Swett, 66 N. Y. 206; Denning v. Kane, 26 State Rep. 972.
[65] Van Doren v. Jelliffe, 1 Misc. 354.
[66] Delaware, L. & W. R. Co. v. Bowns, 36 Super. Ct. (4 J. & S.) 126.
[67] Code Civ. Proc. § 483.
[68] Benedict v. Seymour, 6 How. Pr. 298.
[69] Hatch v. Matthews, 9 Misc. 307.
[70] Landau v. Levy, 1 Abb. Pr. 376; Anderson v. Speers, 8 Abb. N. C. 382; Flynn v. Bailey, 50 Barb. 73; Simmons v. Fairchild, 42 Barb. 404; Victory Webb, etc., Mfg. Co. v. Beecher, 55 How. Pr. 193.
[71] For instance, introductory allegations as to the character in which plaintiff sues, need not be repeated.
[72] Blanchard v. Jefferson, 28 Abb. N. C. 236.
[73] Baker White Brass Co. v. Donohue, N. Y. Daily Reg., Jan. 23, 1884.
[74] Parsons v. Hayes, 4 Month. Law Bul. 31.

separate the causes of action renders the complaint subject to a motion to make more definite and certain, but not to a demurrer.

§ 849. Demand for judgment.

The concluding part of a complaint is the demand for judgment to which the plaintiff supposes himself entitled.[75] This usually contains a demand for costs, though such a demand is not necessary. The complaint "must" contain a demand for "judgment."[76] The old Code used the word "relief" but the word "judgment" was substituted by the present Code to exclude prayers for provisional remedies from the complaint.

The demand is no part of the statement of facts required to constitute a cause of action,[77] and hence is not itself the subject of a demurrer.[78]

The necessity of accuracy in formulating the demand for relief arises in part from the fact that if no answer is interposed, a judgment by default for failure to answer is limited to the relief prayed for.[79] But where there is an answer, the court may permit any judgment consistent with the case made by the complaint and embraced within the issue.[80] When an answer has been interposed, a prayer for too much or too little, or for wrong relief, is not fatal,[81] nor is the fact that plaintiff does not demand the precise damages to which he is entitled, or mistakes the true rule of damages.[82] And inasmuch as forms of action have been abolished, the fact that plaintiff has mistaken the nature of the relief to which he is entitled and that he has sued for equitable relief, where only legal relief

[75] Code Civ. Proc. § 481, subd. 3.

[76] Code Civ. Proc. § 481, subd. 3.

[77] Emery v. Pease, 20 N. Y. 62; Hopkins v. Lane, 2 Hun, 38.

[78] Buess v. Koch, 10 Hun, 299. See post, p. 1000.

[79] Code Civ. Proc. § 1207.

[80] Code Civ. Proc. § 1207.

[81] Gray v. Fuller, 17 App. Div. 29; Murtha v. Curley, 90 N. Y. 372; Muldowney v. Morris & E. R. Co., 42 Hun, 444; Frear v. Pugsley, 9 Misc. 316; Colby v. Colby, 81 Hun, 221; Bell v. Gittere, 30 State Rep. 219; Hughes v. Harlam, 37 App. Div. 528; Dodge v. Johnson, 9 Civ. Proc. R. (Browne) 339.

[82] Colrick v. Swinburne, 105 N. Y. 503; Ketchum v. Van Dusen, 11 App. Div. 332.

may be granted, or vice versa, does not authorize a refusal to grant any relief whatever but the complaint should be retained and appropriate relief granted.[83]

Both legal and equitable relief may be demanded[84] as may relief in the alternative[85] provided the reliefs sought be consistent.[86] But inconsistent relief should not be prayed for. For instance, plaintiff should not ask for a forfeiture of a lease and also for an injunction against the lessee to restrain him from making alterations.[87] So a demand of payment of an instalment of purchase money in arrears and also a forfeiture of the contract are inconsistent.[88]

No relief can be granted under the general prayer in case there is no answer[89] while if there is an answer any judgment "consistent with the case made by the complaint and embraced within the issue," may be granted, irrespective of whether or not there is any prayer for general relief in addition to the specific relief demanded. Hence it would seem that while the prayer for general relief, as formerly used in equity, is often used under the Code system of pleading[90] it is a mere form and of no effect.

While the prayer for relief is not conclusive as to whether the cause of action is legal or equitable in its character,[91] yet it may be resorted to, in case of doubt, for the purpose of determining the character of the complaint and the nature of the cause of action.[92]

[83] Cuff v. Dorland, 55 Barb. 482; Sternberger v. McGovern, 56 N. Y. 12.

[84] New York Ice Co. v. Northwestern Ins. Co. of Oswego, 23 N. Y. 357.

[85] Campbell v. Campbell, 23 Abb. N. C. 187; Lyke v. Post, 65 How Pr. 298.

[86] Linden v. Hepburn, 5 Super. Ct. (3 Sandf.) 668.

A demand for general relief is inconsistent with a demand for judgment in a specified sum, in an action for a money demand on contract, and should be stricken out. Durant v. Gardner, 10 Abb. Pr. 445, 19 How. Pr. 94.

[87] Linden v. Hepburn, 5 How. Pr. 188.

[88] Young v. Edwards, 11 How. Pr. 201.

[89] Simonson v. Blake, 12 Abb. Pr. 331.

[90] The general prayer will not be stricken out. Hemson v. Decker, 29 How. Pr. 385.

[91] Williams v. Slote, 70 N. Y. 601.

[92] Elias v. Schweyer, 27 App. Div. 69; Mills v. Bliss, 55 N. Y. 139; Peck v. Richardson, 12 Misc. 310; Rodgers v. Rodgers, 11 Barb. 595.

As already stated, if the complaint contains two or more causes of action which are separately stated, it is not necessary to add a demand for judgment to each cause of action, it being sufficient to include one prayer for judgment for a sum equal in the aggregate to the amount claimed in the several causes of action.

The demand for judgment in an action where damages are sought to be recovered is generally in the following form: "Wherefore the plaintiff prays judgment against the defendant for the said sum of $——— with interest from ——— to ———, and his costs of suit."

——**Demand for interlocutory as well as final judgment.** If the action is one triable by the court without a jury, the plaintiff may in a proper case demand an interlocutory judgment, and also a final judgment, distinguishing them clearly.[93] An interlocutory judgment is not defined by the Code but has been defined by the courts as one that decides not the case, but only some intervening matter relating to the cause of action.[94] It is a primary or intermediate judgment given in the course of an action on some plea, proceeding or default which is only intermediate and does not determine or complete the suit, as upon a demurrer or plea in abatement, or where the right of the plaintiff is established but the quantum of damages is not ascertained.[95] An illustration of an interlocutory judgment might arise in a suit for an accounting, where there was a defense that the plaintiff was not entitled to an accounting, in which case such issue would have to be tried, and then if it was determined plaintiff was entitled to an accounting, the judgment would direct a reference to take the accounting and that on the coming in of the report a final judgment determining the rights of the parties be entered.[96]

§ 850. Conformity to summons.

The complaint should conform to the summons as to the

[93] Code Civ. Proc. § 482.
[94] Mora v. Sun Mut. Ins. Co., 13 Abb. Pr. 304.
[95] Cyc. Law Dict. 494.
[96] Bishop's Code Practice in Personal Actions, p. 161.

venue,[97] the parties,[98] and the nature of the action.[99] But the statement is of very little practical importance inasmuch as an amendment will remedy any variance and the Code provides that in a court of record where a verdict, report or decision has been rendered, the judgment shall not be stayed, nor shall any judgment of a court of record be impaired or affected by reason of a variance between the summons and complaint.[100] If the complaint does not follow the summons the remedy is by motion.[101]

Forms of complaints.

A few of the more common forms of complaints are given herewith, though forms of complaints in special actions, such as actions relating to real property, will be given in subsequent chapters relating particularly to such actions.

—— Complaint on promissory note, payee against maker.

THE COMPLAINT of the above named plaintiff respectfully show to this court that * * * at * * * made * * * promissory note, bearing date on the * * * day of * * * in the year one thousand nine hundred and * * * whereby he promised to pay

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97 But if the summons and complaint differ, the complaint controls. Fisher v. Ogden, 12 App. Div. 602. See, also, Bark v. Carroll, 33 Misc. 694.

98 Thus if the summons describes plaintiff as administrator and the complaint omits the description, the complaint may be set aside as irregular. Blanchard v. Strait, 8 How. Pr. 83.

But all the persons named as parties in the summons need not be named in the complaint. Travis v. Tobias, 7 How. Pr. 90.

99 But the fact that plaintiff has served a summons with a notice that in case of default judgment will be taken for a specified sum, does not preclude him from serving a complaint for conversion, nor entitle defendant to have the complaint struck out. Sharp v. Clapp, 15 App. Div. 445, 78 State Rep. 451, 4 Ann. Cas. 190.

And a departure of the complaint from the summons in respect to the form of relief, is not ground for reversing the judgment on appeal. If necessary to sustain the judgment, the summons may be amended to conform to the facts proved, on appeal from the judgment. Willet v. Stewart, 43 Barb. 98.

100 Code Civ. Proc. § 721, subd. 4.

101 Graves v. Waite, 59 N. Y. 162; Haynes v. McKee, 18 Misc. 361, 75 State Rep. 941.

* * * after the date thereof to * * * dollars, for value received, and delivered the said note to the said plaintiff who is now the owner thereof.

THAT the said defendant has not paid the said note nor any part thereof.

WHEREFORE the said plaintiff demand judgment against the said defendant for the sum of * * * principal, with interest from the * * * day of * * * together with all costs and disbursements of this action.

_____,

Plaintiff's Att'y.

—— Complaint on promissory note, payee or bearer against maker—Two or more notes.

For his first cause of action, plaintiff alleges:

That at * * * on or about the * * * day of * * * said defendant made, executed, and delivered his certain promissory note in writing bearing date the * * * day of * * * wherein and whereby he promised to pay to plaintiff [or "to * * * or bearer," if plaintiff is not payee] on the * * * day of * * * [or * * * days from said date] the sum of $ * * * with interest at the rate of * * * per cent per annum from date until paid; that plaintiff is now the owner and holder of said note; that the same is now due and owing; and that no part thereof has been paid.

For a second and separate cause of action, plaintiff alleges [same form as before, with description of second note].

Wherefore plaintiff demands judgment against said defendant for $ * * *, the principal sums of said notes, with interest at * * * per cent on $ * * * from * * *, and interest at * * * per cent on $ * * * from * * * [these allegations may be combined if date and interest rate of notes is the same], together with the costs and disbursements of this action.

—— Complaint on a promissory note against endorser.

THE COMPLAINT of the above named plaintiff respectfully shows to this court, that on the * * * day of * * * one thousand eight hundred and * * * made * * * promissory note in writing, whereby he promised to pay * * * the sum of * * * dollars * * * and the defendant afterwards * * * endorsed the said promissory note, and transferred the same to the plaintiff. And the plaintiff further says that when the said promissory note became due and payable, the same was duly presented to the maker thereof for payment, and payment thereof was demanded of the said maker who neglected to pay the same; whereupon said note was duly protested for non-payment, of all of which the defendant was duly noti-

fied. Yet the plaintiff says that the said defendant has not paid the said promissory note, but remains indebted to the plaintiff thereupon, in the sum of * * * dollars, * * * beside interest, for which sum with interest from the * * * day of * * * one thousand eight hundred and * * * besides costs the plaintiff demands judgment.

—— Complaint on bill of exchange against acceptor.

THE COMPLAINT of the above named plaintiff respectfully shows to this court, that on the * * * day of * * * one thousand nine hundred and * * * at * * * made * * * bill of exchange in writing and directed the same to * * * at * * * and thereby required the said * * * to pay to * * * the sum of * * * and then and there delivered the said bill to * * * the plaintiff and the said plaintiff further say that on the * * * day of * * * one thousand nine hundred and * * * the said bill was duly presented to the defendant for acceptance, and that the defendant thereupon duly accepted the same. And the plaintiff further say that * * *, now the lawful owner and holder of the said bill, and the defendant is justly indebted to * * * therefor in the sum of * * * principal, together with interest thereon from the * * * day of * * * one thousand nine hundred and * * * for which principal sum and interest, with costs of this action, the plaintiff demands judgment.

—— Complaint for goods sold and delivered.

THE COMPLAINT of the above named plaintiff respectfully shows to this court * * * that between the * * * day of * * * * * * and the * * * day of * * *—* * * (both dates inclusive) * * * he sold and delivered to the above named defendant * * * the following described merchandise at the times and for the prices below specified, that is to say: * * *

AND that there is due from the said defendant to the said plaintiff on account of the said merchandise * * * with interest from * * *, no part of which has been paid.

WHEREFORE, the said plaintiff demand judgment against the said defendant for the sum of * * * with interest from * * * and all costs and disbursements of this action.

_____,
Plaintiff's Attorney.

—— Complaint for work, labor and materials furnished.

THE COMPLAINT of the above named plaintiff respectfully shows to this court, that the above named plaintiff between the * * * day of * * *, and the * * * day of * * * rendered to and performed for the above named defendant at his request, certain work, labor and services, and plaintiff then and there furnished to defendant, at

like request, certain materials and other necessary things in and about such work, labor and services for the defendant as follows: * * *

THAT the said work, labor and services and materials furnished are and were reasonably worth the sum of * * *, which sum defendant promised and agreed to pay plaintiff therefor; but defendant has failed and neglected to pay said sum or any part thereof.

WHEREFORE the plaintiff demand judgment against the said defendant for the sum of * * * with interest from * * * together with costs.

_____,
Plaintiff's Att'y.

—— Assault and battery.

THE COMPLAINT of the above named plaintiff respectfully shows to this Court, that on or about the ——— day of ——— one thousand nine hundred and ——— at * * * ——— the defendant assaulted, beat and ill-treated the plaintiff, ——— to plaintiff's damage ——— dollars.

WHEREFORE the plaintiff demands judgment against the defendant for the wrong and injury, and that the defendant may be adjudged to pay to the plaintiff compensation therefor to the amount of * * * dollars, besides costs.

CHAPTER III.

ANSWER.

ART. I. INTRODUCTORY.

§ 851. Remedies open to defendant.

The summons having been served in an action, the defendant is called on to act in some way within twenty days or else

judgment by default may be taken against him. If a copy of the complaint has not been served with the summons, it is customary to first demand a copy of the complaint. The order in which defendant may object to or answer the complaint is as follows: 1st, motions relating to the complaint; 2nd, demurrer; 3d, answer. If defendant has any objections to the form of the complaint, he should raise such objections by making a motion to strike out portions of the complaint, or to make the complaint more definite and certain, or for a bill of particulars. If inconsistent causes of action are stated, a motion to compel an election may be made. If the objection to the complaint relates to a matter of substance, defendant must demur before answering, provided the objection appears on the face of the complaint. If defendant admits liability for a certain sum but denies any greater liability, he may protect himself against subsequent costs by making an offer to allow judgment for the sum admitted to be due, or by making a tender of the amount due.[1] Objections to the summons, if any, should be urged before answering, but, if defendant desires to question the jurisdiction of the court over his person, he should be careful to see that any appearance made by him constitutes a special, rather than a general, appearance. In a proper case, if security for costs has not been given by the plaintiff, defendant may move to stay proceedings until such security is given.[2] If defendant is an infant, application should be made for a guardian ad litem before answering.[3] In case defendant has not sufficient facts at his command to enable him to intelligently prepare an answer, a motion may be made for a bill of particulars or for permission to examine plaintiff before trial or to inspect his papers. Defendant may also, before answering, exercise his privilege, in a proper case, of moving for a change of venue. In case defendant admits liability, but is in serious doubt as to the exact person to whom the liability exists, he may move for an order substituting the other claimant in his place as defendant.

[1] Code Civ. Proc. §§ 731-754.
[2] See post, Vol. II.
[3] Code Civ. Proc. § 471.

§ 852. Time to answer.

The summons having been served, defendant is called on to act in some way within twenty days thereafter or else a judgment by default may be taken against him; but where defendant is arrested before answer, he has twenty days after the arrest in which to answer the complaint, except where an order of arrest can be granted only by the court.[4] And if the complaint is not served with the summons, defendant is not obliged to answer, if he has entered an appearance and demanded a copy of the complaint, until twenty days after the service of the complaint.[5] If service of summons is by publication defendant must answer within twenty days from the date of the last publication.[6] If there is substituted service of summons, defendant must answer within twenty days after the filing of an affidavit showing service according to the order.[7]

If the complaint is subject to a motion, defendant should move before taking any other step and at the same time obtain an extension of the time to answer which is usually granted as a matter of course.

If the complaint is not subject to a motion but is, on its face, subject to a demurrer, defendant may, before answering, demur within twenty days. If an answer is interposed after the overruling of the demurrer, it must be served within the time allowed in the order overruling the demurrer. The time to answer after a demurrer has been overruled, does not begin to run until an interlocutory judgment has been entered.[8]

[4] Code Civ. Proc. § 566; Clady v. Wood, 66 How. Pr. 1.

[5] But see Paine v. McCarthy, 1 Hun, 78, 3 Thomp. & C. 755, which held it insufficient to serve answer within twenty days after service of complaint where more than twenty days after service of summons.

[6] Code Civ. Proc. § 441.

But if defendant appears before the publication is completed and demands a copy of the complaint, the time to answer runs from the time of service of a copy of the complaint. Van Zandt v. Van Zandt, 23 Abb. N. C. 328.

[7] Code Civ. Proc. § 437; Smith v. Fogarty, 6 Civ. Proc. R. (Browne) 366; Orr v. McEwen, 16 Hun, 625, contains dicta to the effect that the time of making the service is the date from which the twenty days commence to run.

[8] Miller v. Sheldon, 15 Hun, 220; Metropolitan Nat. Bank v. Bussell, 14 Abb. N. C. 98; Ford v. David, 14 Super. Ct. (1 Bosw.) 569.

If the complaint is sufficient on its face, defendant must answer within twenty days or obtain an extension of time to answer.

—— **Extension of time to answer.** The twenty days fixed by statute to answer, can only be enlarged by consent or by an order for that purpose. It is not extended by an order to stay plaintiff's proceedings.[9]

It is common practice to obtain an extension of time by a stipulation such as the following:

"It is hereby stipulated that the time for the defendant to answer, demur to or make any motion with relation to the complaint in this action, may be and hereby is extended to and including the ——— day of ——— 19— the issue in said action to date as if no extension had been granted."

[Date.] [Signature of attorney for plaintiff.]

Such a stipulation is to be construed as meaning the specified number of days in addition to the time allowed by statute and not merely such number of days from the date of the stipulation.[10]

In a prior chapter,[11] the article of the Code containing the general regulations respecting time,[12] has been considered. It has been seen that the time for doing an act may be enlarged, before its expiration, on an affidavit showing grounds therefor, by the court or by a judge authorized to make an order in the action;[13] and that after the expiration of the time within which a pleading must be made, the court may relieve the party from the consequences of the omission to plead.[14] These general rules will not be further repeated in this connection but the grounds for extending time to answer and the procedure as fixed by the general rules of practice, will be considered. The

[9] McGown v. Leavenworth, 2 E. D. Smith, 24, 31.

So held where order stayed proceedings pending appeal from order denying motion to set aside proceedings for arrest of defendant. Petrie v. Fitzgerald, 2 Abb. Pr., N. S., 354. Likewise where stay was pending motion for a bill of particulars. Sniffen v. Peck, 6 Civ. Proc. R. (Browne) 188; Platt v. Townsend, 3 Abb. Pr. 9.

[10] Pattison v. O'Connor, 23 Hun, 307.

[11] See ante, §§ 681-686.

[12] Code Civ. Proc. §§ 780-788.

[13] Code Civ. Proc. § 781.

[14] Code Civ. Proc. § 783.

order is properly granted in case a motion to consolidate two actions is pending,[15] or pending appeal from an order denying defendant's motion to set aside the summons for want of jurisdiction of his person.[16] So the time within which to answer an amended complaint may properly be extended pending an appeal from the order allowing amendment.[17] The application may be made ex parte where the time has not expired[18] though not thereafter.[19] But where the time has been extended by order or stipulation for twenty days, no further time will be granted by order except on two days' notice of motion.[20] And in the New York city court, no extension of time to answer for more than two days will be granted, unless upon notice to plaintiff's attorney.[21] The party applying for the order must present to the judge to whom the application is made, an affidavit of merits, or proof that it has been filed, or an affidavit of the attorney or counsel retained to defend the action that from the statement of the case in the action made to him by the defendant he verily believes that the defendant has a good and substantial defense upon the merits to the cause of action set forth in the complaint, or to some part thereof. The affidavit should also state the cause of action, and the relief demanded in the complaint, and whether any and what extension or extensions of time to answer or demur have been granted by stipulation or order, and where any extension has been had, the date of issue shall be the same as though the answer had been served when the time to answer first expired.[22]

[15] German Exch. Bank v. Kroder, 14 Misc. 179, 69 State Rep. 810.

[16] De Meli v. De Meli, 16 Wkly. Dig. 306.

[17] Watson v. Manhattan Ry. Co., 55 Super. Ct. (23 J. & S.) 547, 18 State Rep. 457.

[18] German Exch. Bank v. Kroder, 14 Misc. 179, 69 State Rep. 810; Sisson v. Lawrence, 25 How. Pr. 435, 16 Abb. Pr. 259, note.

But in an action against a corporation to recover damages for the non-payment of a note or other evidence of debt, for the absolute payment of money, notice must be given. Code Civ. Proc. § 1778.

[19] Fries v. Coar, 19 Abb. N. C. 267, 13 Civ. Proc. R. (Browne) 152.

[20] Rule 24 of General Rules of Practice.

[21] Rule 25 of Rules of City Court of N. Y.

[22] Rule 24 of General Rules of Practice.

But where a non-resident plaintiff is required, upon defendant's application, to file security for costs, the court may properly extend

The order grants an extension of a specified number of days which may exceed twenty days[23] but should not be for a longer time than actually necessary. Such an order allows defendant to demur as well as answer,[24] but does not extend the time to make a motion relating to the complaint[25] unless such right is reserved in the stipulation or order.[26]

After the order is procured it must be served together with the affidavit on which it was granted, or a copy thereof.[27] If the order so served is not accompanied with a copy of the affidavit of merits, it may be disregarded and judgment entered upon defendant's default,[28] though it has been held that before entering judgment plaintiff should give notice of his intention to disregard it.[29] If the order is mailed on the last day of the time to answer, it is sufficient to prevent plaintiff from entering judgment as upon failure to answer.[30]

Form of affidavit to obtain extension of time to answer.

——— being duly sworn, says that he is ——— the attorney for the defendant ——— and resides in the ——— of ———.

That the complaint herein was served on the defendant ——— on the ——— day of ———, 19— and that the time for said defendant to answer expires ———.

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defendant's time to answer until a certain number of days after security is filed without requiring him to make and file an affidavit of merits. Worthington v. Warner, 19 Abb. N. C. 266.

[23] The Code rule limiting ex parte orders to stay proceedings to twenty days is not applicable. Sisson v. Lawrence, 25 How. Pr. 435; German Exch. Bank v. Kroder, 14 Misc. 179.

[24] Brodhead v. Brodhead, 4 How. Pr. 308, 3 Code R. 8.

[25] Post v. Blazewitz, 13 App. Div. 124; Brooks v. Hanchett, 36 Hun, 70.

[26] Marry v. James, 34 How. Pr. 238, 2 Daly, 437; Restorff v. Ehrich, 1 Month. Law. Bul. 33.

See Peart v. Peart, 48 Hun, 79.

[27] Failure to serve affidavit or copy warrants a disregard of the order. Code Civ. Proc. § 782.

[28] Corning v. Roosevelt, 18 Civ. Proc. R. (Browne) 193; Ellis v. Van Ness, 14 How. Pr. 313.

Contra,—Campbell v. American Zylonite Co., 53 Super. Ct. (21 J. & S.) 131.

[29] First Nat. Bank of Plainfield v. Ranger, 14 Civ. Proc. R. (Browne) 1.

[30] Schuhardt v. Roth. 10 Abb. Pr. 203.

That the cause of action set out in the complaint is ——— and that the relief demanded is ———.

That no ——— extension of time to answer or demur has been granted by stipulation or order, and no previous application for an order extending the time to answer herein from the time when it will now expire has been made, and that the reason why deponent has been unable to prepare and serve such answer is ———.

That from the statement of the case in the action made to deponent by the defendant ——— deponent verily believes that the defendant has a good and substantial defense upon the merits, to the cause of action set forth in the complaint or to some part thereof.

That no previous application has been made for the order except ———.

Form of order granting extension of time to answer.

Upon the foregoing affidavit of ———.

Ordered, that the time of the defendant ——— to plead or make any motion with relation to the complaint in this action be, and hereby is extended ——— days from the date hereof. Issue herein to be of date as if no extension had been granted.

[Date.]

§ 853. Contents in general.

The answer of the defendant must contain: 1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief. 2. A statement of any new matter constituting a defense or counter-claim, in ordinary and concise language, without repetition.[31]

The following table clearly presents the classification of matter in an answer:

1. Denials	1. General denials	a.	Positive denials.
		b.	Denials on information and belief.
		c.	Denials of knowledge or information.
	2. Specific denials	a.	Positive denials.
		b.	Denials on information and belief.
		c.	Denials of knowledge or information.
2. New matter	1. Defenses	a.	Defenses in bar.
		b.	Dilatory defenses.
	2. Counterclaims.		

If a statutory ground of demurrer does not appear on the

[31] Code Civ. Proc. § 500.

face of the complaint, the objection may be taken by answer.[32]

Though the Code does not so specifically require, an answer is usually commenced with a caption in the same form as the caption of the complaint. The body of the answer usually begins with the words, "The defendant for his answer to the plaintiff's complaint says."

§ 854. Demand for relief.

The answer need not contain any prayer for the relief to which the defendant would, under its allegations, be entitled, except when defendant asks affirmative relief.[33] It is usual, however, to conclude an answer with such words as "Wherefore defendant demands judgment herein dismissing the complaint, with costs." But if defendant seeks an affirmative judgment on a counterclaim, he must demand the judgment in his answer.[34] And if a co-defendant desires a determination of the ultimate rights of the defendants, he must demand such a judgment in his answer.[35]

§ 855. Joint and several answers.

Defendants may answer either together or separately. But defenses set up in the joint answer of several defendants must be available to all of the defendants so answering, or else the answer will be demurrable.[36] On the other hand, if defendants answer separately, the answer of one will not inure as an answer by the others,[37] though it would seem that where several executors, sued for a demand against the estate, sever in their answers, each has the benefit of all the answers, and plaintiff must succeed against all or none.[38]

ART. II. DENIALS.

§ 856. Nature and kinds of denials.

A denial is a traverse of the statement of the plaintiff in his

[32] Code Civ. Proc. § 498.

[33] Bendit v. Annesley, 42 Barb. 192, 27 How. Pr. 184; Dawley v. Brown, 9 Hun, 461.

[34] Code Civ. Proc. § 509; Rundle v. Allison, 34 N. Y. 180; Dewey v. Hoag, 15 Barb. 365.

[35] Code Civ. Proc. § 521.

[36] Tailor v. Spaulding, 12 Civ. Proc. R. (Browne) 123.

[37] Alfred v. Watkins, 1 Edm. Sel. Cas. 369.

[38] Fort v. Gooding, 9 Barb. 371.

complaint. A version of the transaction different from that alleged in the complaint is not a denial,[39] nor is an allegation of fact, merely inconsistent with the pleading.[40]

A denial must be direct and unequivocal. If it merely implies that the allegation is controverted, or justifies an inference that such is or will be claimed to be its effect, it will not be construed as a denial.[41] For instance, a mere declaration that defendant is informed and believes that a certain allegation in the complaint is untrue, and that he could so prove it on the trial by way of defense, is not a denial.[42] But the phrase "says" that he denies is sufficient.[43]

Denials are either general or special. The distinction between them will be noticed in the following sections.

—— **Denials as defenses.** A denial is distinct and separate from a defense, and a defense cannot consist in part of a denial.[44] For instance, it is improper for defendant, after several specific denials, to incorporate in a subsequent defense setting up new matter, the statement that the defendant "reiterates the denials of the first defense and alleges," etc.[45] The courts have not always kept in mind this distinction and often speak of a denial as a defense or as part of a defense. A denial only raises an issue on the complaint; whereas a defense consists of new matter which is a defense to the action, even though the complaint be true.[46]

§ 857. What should be denied.

An answer should only deny "material" allegations,[47] but

[39] Miller v. Winchofer, N. Y. Daily Reg., March 30, 1881.

[40] Place v. Bleyl, 45 App. Div. 17; Swinburne v. Stockwell, 58 How. Pr. 312; West v. American Exch. Bank, 44 Barb. 175; Berry v. Rowley, 11 App. Div. 396; Smith v. Coe, 170 N. Y. 162; Soper v. St. Regis Paper Co., 38 Misc. 294.

[41] West v. American Exch. Bank, 44 Barb. 175; Wallach v. Commercial Fire Ins. Co., 12 Daly, 387; Conkling v. Manhattan R. Co., 36 State Rep. 124, 12 N. Y. Supp. 846.

[42] Bidwell v. Overton, 26 Abb. N. C. 402, 35 State Rep. 574.

[43] Jones v. Ludlum, 74 N. Y. 61.

[44] Flack v. O'Brien, 19 Misc. 399, 77 State Rep. 854.

[45] State of South Dakota v. McChesney, 87 Hun, 293.

[46] Staten Island Midland R. Co. v. Hinchcliffe, 34 Misc. 49.

[47] King v. Utica Ins. Co., 6 How. Pr. 485.

facts impliedly averred by reasonable and fair intendment of the pleading are traversable in the same manner as though directly stated.[48] Hence, a legal conclusion should not be denied.[49] For instance, a denial of liability being a traverse of a legal conclusion is nugatory,[50] as is a denial that plaintiff is the owner and holder of the note sued on,[51] or a denial that plaintiff is entitled to the sum demanded or any part thereof,[52] or a denial that defendants "are indebted in any sum whatever upon the alleged cause of action set forth in the complaint."[53]

§ 858. General denials.

A general denial is a denial of all the allegations in the complaint.[54] It corresponds very nearly to the general issue in actions of assumpsit and of debt on simple contract, at common law.[55] It is not required to be in any particular form or to be couched in any special phraseology,[56] but it should, by its words, so describe the allegations of the complaint which the pleader intends to controvert that any person of intelligence can identify them.[57] The usual form is, "the defendant, answering the complaint herein, denies each and every allegation therein contained." Or if the denial relates to only one of the causes of action, it is customary to say, "the defendant, answering the first alleged cause of action set forth in the complaint herein, denies each and every allegation therein con-

[48] Dougan v. Evansville & T. H. R. Co., 15 App. Div. 483, 78 State Rep. 503, 44 N. Y. Supp. 503.

[49] Emery v. Baltz, 94 N. Y. 408; Kay v. Churchill, 10 Abb. N. C. 83; McMurray v. Gifford, 5 How. Pr. 14.

[50] Strauss v. Trotter, 6 Misc. 77, 55 State Rep. 489.

[51] Seeley v. Engell, 17 Barb. 530; Fleury v. Roget, 7 Super. Ct. (5 Sandf.) 646.

[52] Drake v. Cockroft, 4 E. D. Smith, 34, 10 How. Pr. 377, 1 Abb. Pr. 203.

[53] Lamb v. Hirschberg, 1 Misc. 108, 48 State Rep. 658; Fosdick v. Groff, 22 How. Pr. 158; Berrigan v. Oviatt, 3 How. Pr., N. S., 199.

[54] But see Thompson v. Erie R. Co., 45 N. Y. 468, and Mutual Life Ins. Co. v. Toplitz, 58 App. Div. 188, which holds that a denial of several though not of all, is a general denial.

[55] McKyring v. Bull, 16 N. Y. 297.

[56] Clark v. Dillon, 97 N. Y. 370.

[57] Mattison v. Smith, 24 Super. Ct. (1 Rob.) 706, 19 Abb. Pr. 288.

tained." An answer in terms merely denying each and every "material" allegation in the complaint is not definite and certain.[58] A denial of "the complaint in each and every allegation therein contained," is a sufficient denial of the entire complaint.[59] So, a denial of all the substantive allegations of a paragraph of the complaint, set out in the language used therein, is tantamount to a denial of each allegation of the paragraph, and is not bad where the denial is not framed so as to form a negative pregnant.[60]

—— **General denial coupled with admissions.** Whether a denial of "each and every allegation set forth in the complaint, except as herein admitted, qualified, or explained," or words of similar purport, is sufficient, has been the subject of many conflicting decisions in this state.[61] It is admitted that such a denial is neither a general nor special denial but the use thereof is very common, though such a denial is not to be commended.[62] The generally accepted rule at present, however, is that the sufficiency of such a denial depends upon whether it definitely conveys to the plaintiff and to the court a clear understanding as to what allegations are denied.[63] In other words,

[58] Mattison v. Smith, 24 Super. Ct. (1 Rob.) 706, 19 Abb. Pr. 288.

[59] People v. Tunnicliff, 17 Civ. Proc. R. (Browne) 381, 26 State Rep. 60, 7 N. Y. Supp. 91.

[60] Donovan v. Main, 74 App. Div. 44.

[61] Cases holding denial good. Crane v. Crane, 43 Hun, 309, 5 State Rep. 423, 26 Wkly. Dig. 102; Calhoun v. Hallen, 25 Hun, 155; McGinness v. City of New York, 13 Wkly. Dig. 522, 26 Hun, 142; Learned v. City of New York, 21 Misc. 601.

Cases holding denial bad. Barton v. Griffin, 36 App. Div. 572; McEncroe v. Decker, 58 How. Pr. 250; Thierry v. Crawford, 33 Hun, 366; Luce v. Alexander, 49 Super. Ct. (17 J. & S.) 202, 4 Civ. Proc. R. (Browne) 428; Hoffman v. New York, L. E. & W. R. Co., 50 Super. Ct. (18 J. & S.) 403; Potter v. Frail, 67 How. Pr. 445.

[62] Mr. Pomeroy, in his work on Code Remedies, p. 709, says that this kind of a denial "violates every principle" of the theory of the Code procedure "and is a contrivance of ignorance or indolence."

[63] Griffin v. Long Island R. Co., 101 N. Y. 348; Pittenger v. Southern Tier Masonic Relief Ass'n, 15 App. Div. 26, 78 State Rep. 124; Tracy v. Baker, 38 Hun, 263; Zimmerman v. Meyrowitz, 34 Misc. 307; Mingst v. Bleck, 38 Hun, 358. In other words, such a denial is sufficient if defendant could be punished if the verification was false. Haines v. Herrick, 9 Abb. N. C. 379.

if such a denial clearly shows what allegations are denied and what are admitted, as where a certain paragraph of the complaint is admitted in toto, it is sufficient.[64] But such a denial is not sufficient when the other clauses of the answer do not specifically identify the allegations to which they refer, so that the denial does not indicate the particular portion of the complaint to which it is directed.[65] And if new matter in the answer goes to admit or qualify the legal effect of allegations in the complaint, such allegations are not traversed by a subsequent general denial in the same answer of allegations not thereinbefore "admitted, qualified, or denied."[66] If the denial is uncertain, it may be required to be made more definite and certain[67] and if not so corrected, the evidence in support thereof cannot be excluded on the trial.[68]

—— **Evidence admissible under a general denial.** Under a general denial the defendant may controvert by evidence anything which the plaintiff is bound to prove in the first instance to make out his cause of action, or anything that he is permitted to prove for that purpose under his complaint.[69] In other words, defendant may prove anything tending to show that plaintiff never had a cause of action.[70] New matter in confession and avoidance, or which constitutes a counterclaim, cannot be shown.[71] Want of consideration in an action on a promissory note[72] or on a sealed instrument,[73] non-

[64] For extended note on denials in pleadings, see 15 Abb. N. C. 269.

[65] Miller v. McCloskey, 9 Abb. N. C. 303, 1 Civ. Proc. R. (McCarty) 252, 24 Hun, 657.

[66] Clark v. Dillon, 97 N. Y. 370.

[67] Farnsworth v. Wilson, 5 Civ. Proc. R. (Browne) 179, note.

[68] Greenfield v. Massachusetts Mut. Life Ins. Co., 47 N. Y. 430.

[69] Griffin v. Long Island R. Co., 101 N. Y. 348; Milbank v. Jones, 141 N. Y. 340; Lytle v. Crawford, 69 App. Div. 273.

[70] Schaus v. Manhattan Gas-Light Co., 45 How. Pr. 481, 36 Super. Ct. (4 J. & S.) 262, which states a broader rule is not always true. For example, a complaint on a note must allege non-payment but payment cannot be proved under a general denial.

[71] Simons v. Martin & Gibson Mfg. Co., 25 Misc. 788. What constitutes new matter, see post, § 865.

[72] Rittenhouse v. Creveling, 38 State Rep. 280; Sprague v. Sprague, 80 Hun, 285, 61 State Rep. 862; Manhattan Brass Co. v. Gillman, 23 Misc. 598.

[73] Dubois v. Hermance, 56 N. Y. 673.

performance of all conditions precedent to maintaining the action,[74] the illegality of the contract sued on where such illegality appears on the face of the complaint[75] or from plaintiff's own evidence,[76] etc., may be shown under a general denial. Evidence of payment is not admissible under a general denial except where the complaint contains an allegation of nonpayment as a necessary and material fact to constitute the cause of action.[77] In actions of tort the question of actual damages is raised by a general denial, since what injury a plaintiff has received is a part of his proof to be met by counter-proof without any special pleading.[78] The matters which can not be shown under a general denial, i. e., new matter, will be enumerated hereafter.[79]

§ 859. Specific denials.

A specific denial is, as its name indicates, a denial of some particular averment or averments in the complaint. Its form must therefore depend to a very large degree on the matter and shape of the statement which is thus controverted. It should clearly indicate just what is denied and care should be taken to avoid a negative pregnant.[80] The allegations denied may be designated by referring to them as certain numbered paragraphs of the complaint,[81] but the pleader cannot refer to parts of the complaint which he intends to admit or deny as "at" or "between" certain folios.[82] The form may be as

[74] McManus v. Western Assur. Co., 22 Misc. 269.

[75] Milbank v. Jones, 127 N. Y. 370.

[76] Wilking v. Richter, 25 Misc. 735; Cary v. Western Union Telegraph Co., 20 Abb. N. C. 333.

[77] Cochran v. Reich, 91 Hun, 440; Knapp v. Roche, 94 N. Y. 329. See, also, Schwarzler v. McClenahan, 38 App. Div. 525.

[78] Wandell v. Edwards, 25 Hun, 498.

[79] See post, § 865.

[80] See post, p. 948.

[81] Hoffman v. Susemihl, 15 App. Div. 405, 78 State Rep. 52; Fleming v. Supreme Council, O. of C. F., 32 App. Div. 231.

[82] Melcher v. Kreiser, 28 App. Div. 362; Baylis v. Stimson, 110 N. Y. 621; Avery v. New York Cent. & H. R. R. Co., 24 State Rep. 918; Varnum v. Hart, 47 Hun, 18, 14 State Rep. 140; Williams v. Lindblom, 68 Hun, 173, 52 State Rep. 78; Crosley v. Cobb, 3 How. Pr., N. S., 37; Caulkins v. Bolton, 98 N. Y. 511; Calkins v. Bolton, 21 Wkly. Dig. 333.

follows: "Denies each and every allegation contained in the paragraphs numbered ——— and ——— of said complaint."

——**Negative pregnant.** A denial in the form of a negative pregnant is one pregnant with an admission of the substantial fact which is apparently controverted; or, in other words, one which, although in the form of a traverse, really admits the important fact contained in the allegation.[83] Such a denial is not authorized by the Code, although, it seems, that in the absence of a motion to correct or make more certain, such pleading may be regarded as sufficient.[84] Thus, a denial of a series of allegations must be in the disjunctive; it must controvert each of them separately and not merely deny them collectively.[85] For instance, an answer to a complaint in an action for slander, which simply states that the defendant did not utter the precise words, at the precise time, and in the particular place and manner stated in the complaint, is clearly bad.[86] The denial should have been that defendant denies that at the place specified in the complaint "or at any other place," and on the day named in the complaint "or at any other time," etc. The word "or" should be used. Thus in an action on an insurance policy, a good form of denial would be to deny that more than sixty days before the commencement of this action, "or" at any time, the plaintiff presented to the attorney of the defendant, pursuant to the terms of said policies, due notice and proofs of the loss.[87] It is not sufficient to allege no knowledge or information sufficient to form a belief as to the truth of "all" the allegations contained in the complaint;[88] nor is it sufficient to deny knowledge or information sufficient to form a belief, "as to each and every allegation" in the complaint.[89]

[83] Pom. Code Rem. § 618. See, also, ante, p. 846.

[84] Stuber v. McEntee, 142 N. Y. 200; Armstrong v. Danahy, 75 Hun, 405.

[85] Pigot v. McKeever, 32 Misc. 45; Pascekwitz v. Richards, 37 Misc. 250; Hopkins v. Everett, 6 How. Pr. 159, 3 Code R. 150; Shearman v. New York Cent. Mills, 1 Abb. Pr. 187; McClave v. Gibb, 11 Misc. 44, 63 State Rep. 455.

[86] Salinger v. Lusk, 7 How. Pr. 430.

[87] McClave v. Gibb. 11 Misc. 44, 63 State Rep. 455.

[88] Collins v. North Side Pub. Co., 1 Misc. 211 49 State Rep. 37.

[89] Waters v. Curtis, 13 Daly, 179.

§ 860. Argumentative denials.

In a preceding subdivision, the rule as to argumentativeness as violating the requirement that pleadings be definite and certain, has been stated. An argumentative denial is one which states facts by way of defense which are merely inconsistent with those stated by the plaintiff. It is well settled that such a denial is insufficient.

§ 861. Joinder of general and specific denials.

It has been held that after a denial "of each and every allegation in the complaint," subsequent denials of particular allegations are but repetitions, and may be struck out;[90] but it has also been held that an answer is not redundant in adding to the denial of specific allegations a general denial.[91] It would seem that the former cases state the true rule, having due regard for the Code provision that the facts must be stated without unnecessary repetition.

The Code rule requiring several defenses to be separately stated, does not relate to denials.[92]

§ 862. Joinder of denial and defense.

A denial and a defense may be pleaded in one answer[93] and defendant should never be required to elect between a denial of the allegations of the complaint and affirmative matters of defense, on the ground of any inconsistency between the two.[94] But new matter, or matter going to support a denial, must not be included in a denial.[95] Thus, allegations of matter going to support a denial of want of probable cause, etc., in an action

[90] Cruikshank v. Press Pub. Co., 32 Misc. 152; Lippencott v. Goodwin, 8 How. Pr. 242; Dennison v. Dennison, 9 How. Pr. 246.

[91] Homan v. Byrne, 14 Wkly. Dig. 175.

[92] Otis v. Ross, 8 How. Pr. 193, 11 N. Y. Leg. Obs. 343.

[93] Radde v. Ruckgaber, 10 Super. Ct. (3 Duer) 684; Biershenk v. Stokes, 43 State Rep. 788; Kellogg v. Baker, 15 Abb. Pr. 286; Otis v. Ross, 8 How. Pr. 193, 11 N. Y. Leg. Obs. 343; Mott v. Burnett, 2 E. D. Smith, 50.

[94] Hollenbeck v. Clow, 9 How. Pr. 289.

[95] Fay v. Hauerwas, 26 Misc. 421; Burkert v. Bennett, 35 Misc. 318.

for malicious prosecution, may be struck out from the defense in which they are commingled with such denial.[96]

§ 863. Forms of denial.

There are three forms of denial: first, when the fact alleged is within the personal knowedge of the defendant and therefore denied directly; second, when the matter alleged is not within the personal knowledge of the defendant, but relying upon his information, he does not believe his allegations to be true and therefore denies upon information and belief; third, when he has no such knowledge or information as would enable him to form a belief, and therefore he denies the allegations.

—— **Denial of knowledge or information.** A defendant may deny "any knowledge or information sufficient to form a belief," of all or any of the material allegations of the complaint,[97] except where such a denial would be a palpable falsehood as where the allegations are of a nature purely personal to defendant. If from lapse of time, or other circumstances, he cannot admit or deny positively an allegation of a fact presumptively within his own personal knowledge, he must set up such circumstances, either in his answer or verification.[98] For instance, the principal should ordinarily be deemed possessed of all the knowledge of the agent sufficiently to form a belief, and therefore cannot deny information or belief as to his acts as such.[99] So a partner cannot be permitted to deny any knowledge or information sufficient to form a belief as to a transaction alleged to have been had with his firm.[100] And if defendant admits that he executed an instrument upon which he is sued, he cannot deny information sufficient to form a belief as to facts stated therein.[101] But it seems that such a de-

[96] Benedict v. Seymour, 6 How. Pr. 298.

[97] Code Civ. Proc. § 500, subd. 1; Pray v. Todd, 71 App. Div. 391.

[98] Richardson v. Wilton, 6 Super. Ct. (4 Sandf.) 708; Fales v. Hicks, 12 How. Pr. 153; Roblin v. Long, 60 How. Pr. 200; Zivi v. Einstein, 2 Misc. 177, 49 State Rep. 720, 23 Civ. Proc. R. (Browne) 56.

[99] Shearman v. New York Cent. Mills, 1 Abb. Pr. 187.

[100] Chapman v. Palmer, 12 How. Pr. 37.

[101] Wesson v. Judd, 1 Abb. Pr. 254.

nial is proper though defendant may be able by inquiry, as by referring to the records, to ascertain whether the allegations of the complaint are true.[102]

The safe practice in making such a denial is to follow the words of the Code. The common form of a general denial is: "Defendant denies that he has any (or alleges that he has no) knowledge or information sufficient to form a belief as to the truth of any of the allegations in said complaint contained."[103] Or, if there are two or more defendants pleading together, say: "Severally deny, each for himself, that he has any knowledge or information," etc. Or if the pleader desires to specifically deny certain paragraphs of the complaint, state that "said defendant denies that she has any knowledge or information sufficient to form a belief as to the allegations contained in paragraphs one, six, and eight of said complaint."[104] An allegation that defendant "is ignorant of whether," etc., is insufficient,[105] as is an allegation that defendant "has no recollection as to the specific sum," etc.,[106] or an allegation that defendant "is not informed, and cannot state" whether, etc.[107] So a denial of any knowledge sufficient to form a belief, without following the words of the statute, which requires a denial of any knowledge or information, has been held insufficient,[108] though there are authorities holding the contrary.[109] So it is insufficient to deny "either upon his own knowledge, or as

[102] Bidwell v. Sullivan, 10 App. Div. 135, 75 State Rep. 1166.

[103] Grocers' Bank v. O'Rorke, 6 Hun, 18.

See Collins v. North Side Pub. Co., 1 Misc. 211.

[104] N. K. Fairbank Co. v. Blaut, 67 State Rep. 583, 24 Civ. Proc. R. (Scott) 334. It is not sufficient to deny knowledge as to the "paragraph" as distinguished from allegations therein. Bidwell v. Overton, 26 Abb. N. C. 402, 35 State Rep. 574, 13 N. Y. Supp. 274.

[105] Wood v. Staniels, 3 Code R. 152.

[106] Nichols v. Jones, 6 How. Pr. 355.

[107] Elton v. Markham, 20 Barb. 343.

[108] Lloyd v. Burns, 38 Super. Ct. (6 J. & S.) 423; Henderson v. Manning, 5 Civ. Proc. R. (Browne) 224.

So allegation of want of information without stating want of knowledge is held insufficient. Steinback v. Diefenbrock, 52 App. Div. 437.

[109] Edwards v. Lent, 8 How. Pr. 28; Ketcham v. Zerega, 1 E. D. Smith, 553; First Nat. Bank of Richfield Springs v. Clarke, 22 Wkly. Dig. 569.

not having any knowledge or information thereof sufficient to form a belief in respect to the same," as it is impossible to distinguish the allegations denied upon knowledge from those denied from want of knowledge or information sufficient to form a belief.[110] And alleging that "said defendant on information and belief has no knowledge," etc., is insufficient.[111] But adding to the common form that defendants "aver the truth to be that they are entirely ignorant and uninformed," does not require that such allegations be stricken out.[112]

—— **Denials on information and belief.** The early cases held that a denial on information and belief was insufficient.

Under the Code of Procedure an answer was allowed, positively denying, when in fact the denial was simply on information and belief, which the verification could show; but under the Code of Civil Procedure which does not allow such a verification, a denial on information and belief must be so expressed in the answer, and such an answer is not frivolous.[113] The rule now is that a defendant may, in his answer, deny, upon information and belief, allegations of the complaint, when he has no personal knowledge as to the facts alleged, but has information sufficient to induce him to believe that the allegations are not true.[114] But a denial upon information and belief of allegations as to facts which must be within the pleader's knowledge is insufficient.[115] And the fact that defendant was absent from the county and the verification of an answer was made by his attorney, does not affect the rule.[116] So a denial on information and belief of allegations which refer to matters of record open to public inspection, where want of knowledge

110 Sheldon v. Sabin, 4 Civ. Proc. R. (Browne) 4, 12 Daly, 84.

111 Galbraith v. Daily, 37 Misc. 156.

112 Meehan v. Harlem Sav. Bank, 5 Hun, 439.

113 Stent v. Continental Nat. Bank, 5 Abb. N. C. 88.

114 Bennett v. Leeds Mfg. Co., 110 N. Y. 150; Wood v. Raydure, 39 Hun, 144, 9 Civ. Proc. R. (Browne) 96; Musgrove v. City of New York, 51 Super. Ct. (19 J. & S.) 528; Ledgerwood Mfg. Co. v. Baird, 14 Abb. N. C. 318, 6 Civ. Proc. R. (Browne) 54; Brotherton v. Downey, 21 Hun, 436, 59 How. Pr. 206; Metraz v. Pearsall, 5 Abb. N. C. 90.

115 Fallon v. Durant, 60 How. Pr. 178; Edwards v. Lent, 8 How. Pr. 28; Hensberry v. Clark, 23 Misc. 37.

116 Pardi v. Conde, 27 Misc. 496.

and information can only arise from an unwillingness to learn the facts, is insufficient.[117]

The common form is that "defendant denies on information and belief," etc. A denial on information and belief must be direct, positive, and explicit, and hence it is not sufficient to state that "on information and belief defendant says that said plaintiff was not injured,"[118] or to answer on information and belief and then proceed with unqualified denials.[119] And a denial "Said defendant denies upon information and belief in part, and in part of her own knowledge, the allegations," is insufficient.[120]

ART. III. DEFENSES.

§ 864. Necessity of pleading defenses.

In order that any defense be available upon the trial, it must be set up in the answer as a defense,[121] whether it constitute an entire or only a partial defense.[122] But matter of avoidance may be relied on by defendant though he has not set it up in his answer where it is alleged in the complaint.[123] New matter cannot be proved under a denial.

§ 865. What is "new matter," constituting a "defense."

A defense must set forth "new matter," i. e., matter extrinsic to the matter set up in the complaint as the cause of action, as distinguished from anything which may be proved under a general denial[124] or a version of the transaction dif-

[117] McLean v. Julien Electric Co., 28 Abb. N. C. 249; Austen v. Westchester Telephone Co., 8 Misc. 11, 58 State Rep. 306.

[118] Powers v. Rome, W. & O. R. Co., 3 Hun, 285.

[119] Pratt Mfg. Co. v. Jordan Iron & Chemical Co., 33 Hun, 143.

[120] N. K. Fairbank Co. v. Blaut, 67 State Rep. 583, 24 Civ. Proc. R. (Scott) 334, 33 N. Y. Supp. 713.

[121] Dewey v. Moyer, 72 N. Y. 70; Donohue v. Syracuse & E. S. Ry. Co., 11 App. Div. 525; Farmers' Loan & Trust Co. v. Siefke, 144 N. Y. 354.

[122] McKyring v. Bull, 16 N. Y. 297.

[123] Terry v. Buek, 40 App. Div. 419; Fairchild v. Lynch, 46 Super. Ct. (14 J. & S.) 1.

[124] Kelly v. Sammis, 25 Misc. 6; McManus v. Western Assur. Co., 43 App. Div. 550.

ferent from that alleged in the complaint.[125] New matter constituting a defense, means some fact which plaintiff is not bound to prove to make out his case, and which goes in avoidance or discharge,[126] It in effect confesses the facts set forth in the complaint (and herein it differs from a denial) and then sets up facts in avoidance. Hence at common law it was called a plea in confession and avoidance. The fact that the same allegation which forms the basis of the partial defense is embodied in the complaint does not take from its character of new matter.[127] "New matter" which may constitute a defense includes matter pleadable at common law in abatement as well as matter pleaded under that system in bar. It includes, among other things, usury,[128] tender,[129] release,[130] accord and satisfaction,[131] discharge in bankruptcy,[132] rescission of contract sued on,[133] an award,[134] payment[135] whether in full or in part,[136] estoppel by judgment,[137] fraud,[138] duress,[139]

[125] Miller v. Winchofer, N. Y. Daily Reg., March 30, 1881.

[126] Stoddard v. Onondaga Annual Conference of Methodist Protestant Church, 12 Barb. 573.

[127] Petrakion v. Arbelly, 23 Civ. Proc. R. (Browne) 183.

[128] Matthiessen v. Kohlsat, 40 State Rep. 227; Cone v. Warner, 18 Wkly. Dig. 90.

[129] Sidenberg v. Ely, 90 N. Y. 257.

[130] Horton v. Horton, 83 Hun, 213.

[131] Habrich v. Donohue, 51 App. Div. 375; Chapin v. Pratt, 49 State Rep. 42; Niggli v. Foehry, 83 Hun, 269.

[132] Cornell v. Dakin, 38 N. Y. 253.

[133] Chapin v. Pratt, 49 State Rep. 42, 20 N. Y. Supp. 952.

[134] Brazill v. Isham, 12 N. Y. (2 Kern.) 9.

[135] Hitchings v. Kayser, 65 App. Div. 302; Lent v. New York & M. Ry. Co., 130 N. Y. 504; Hughes v. Cuming, 36 App. Div. 302; McKyring v. Bull, 16 N. Y. 297; Price Printing House v. Jewelers' Review Pub. Co., 10 Misc. 743, 64 State Rep. 263; Glickman v. Loew, 20 Misc. 401, 79 State Rep. 1040; Baker v. Loring, 92 Hun, 61.

See note on plaintiff's duty to plead nonpayment in 28 Abb. N. C. 478.

[136] Beaman v. Lyon, 8 State Rep. 730; Simons v. Martin & Gibson Mfg. Co., 25 Misc. 788.

[137] Willis v. McKinnon, 37 Misc. 386; Krekeler v. Ritter, 62 N. Y. 372; Bracken v. Atlantic Trust Co., 36 App. Div. 67.

[138] Townshend v. Greenwich Ins. Co., 39 Misc. 87; Forker v. Brown, 10 Misc. 161; Renard v. Graydon, 39 Barb. 548; Oliver v. Bennett, 65 N. Y. 559.

[139] Sternback v. Friedman, 23 Misc. 173.

facts in justification or mitigation,[140] that defendant is a bona fide purchaser,[141] illegality of the contract sued on where it does not appear from the face of the complaint or plaintiff's evidence,[142] etc.

—— **Statute of frauds.** Although there was a conflict among the early cases on the subject, it is now settled that the statute of frauds must be pleaded in order to render it available as a defense,[143] except where it appears on the face of the complaint that the instrument is in violation of the statute of frauds[144] or the complaint does not set forth the contract under which the indebtedness is claimed to have arisen, but only states the indebtedness generally.[145] The reason for this rule is that where the complaint states a contract, but does not aver whether it is in writing, it will be presumed that it was in writing, unless the fact that it was not in writing is specifically raised by the answer.[146] Of course, if plaintiff avers in the complaint that the contract is in writing, and the contract is only required to be in writing by the statute of frauds, defendant need not plead the statute in order to take advantage of it if the plaintiff fails to prove a contract in writing.

—— **Statute of limitations.** The statute of limitations must

[140] Mitchell v. Cody, 6 Misc. 307, 58 State Rep. 138; Billings v. Albright, 66 App. Div. 239; Scofield v. Demorest, 55 Hun, 254; Sawyer v. Bennett, 49 State Rep. 774, 20 N. Y. Supp. 835.

[141] Weaver v. Barden, 49 N. Y. 286.

[142] Milbank v. Jones, 127 N. Y. 370; Marston v. Swett, 66 N. Y. 206; Goodwin v. Massachusetts Mut. Life Ins. Co., 73 N. Y. 480; Drake v. Siebold, 81 Hun, 178; Boyer v. Fenn, 19 Misc. 128.

[143] Franklin Coal Co. v. Hicks, 46 App. Div. 441; Thelberg v. National Starch Mfg. Co., 2 App. Div. 173, 73 State Rep. 452; Bowdish v. Briggs, 5 App. Div. 592; Cruse v. Findlay, 16 Misc. 576, 74 State Rep. 259; Griffin v. Condon, 18 Misc. 236; Matthews v. Matthews, 154 N. Y. 288; Lupean v. Brainard, 20 App. Div. 212; Sanger v. French, 157 N. Y. 213; Irlbacker v. Roth, 25 App. Div. 290.

For a review of the decisions, see Patterson v. Powell, 31 Misc. 250, 7 Ann. Cas. 381.

[144] Baker v. Codding, 44 State Rep. 787; Carling v. Purcell, 46 State Rep. 287; Dearing v. McKinnon Dash & Hardware Co., 33 App. Div. 31.

[145] Alger v. Johnson, 6 Thomp. & C. 632, 4 Hun, 412; Mitchell v. Miller, 25 Misc. 179.

[146] Marston v. Swett. 66 N. Y. 209.

be set up in the answer in order to be available as a defense.[147] A person may avail himself of the presumption of payment of a money judgment or decree, arising from the lapse of twenty years, under an allegation that an action was not commenced, or that the proceeding was not taken, within the time therein limited.[148]

—— **Matters in abatement.** At common law, a plea was called a dilatory plea where it was one attempting to delay the plaintiff's remedy by showing an objection to the action founded on principles of remedial, as distinguished from substantive, law. In other words, they were pleas which set up matter tending to defeat or suspend the suit or proceedings in which they are interposed, but which did not debar the plaintiff from recommencing at some other time or in some other way.[149] Dilatory pleas were divided into three classes: 1st, pleas to the jurisdiction; 2nd, pleas to disability of parties; 3d, pleas in abatement of the writ or declaration. These pleas were required to be pleaded in the order given.

Technical pleas in abatement are abolished by the Code inasmuch as matter in abatement as well as matter in bar is included in the term "new matter." And the Code has in effect abrogated the old rule that a plea in bar waived all pleas in abatement[150] inasmuch as matter in abatement may be pleaded with other defenses and denials.

The grounds of demurrer to the complaint, specified in the Code,[151] where the objections do not appear on the face of the complaint, must be taken by setting up in the answer the new matter showing such defenses;[152] except that the grounds of

147 Code Civ. Proc. § 413; Dezengremel v. Dezengremel, 24 Hun, 457; Minzesheimer v. Bruns, 1 App. Div. 324; Robeson v. Central R. Co., 76 Hun, 444.

A clause requiring all claims to be made in writing within thirty days is in the nature of a statute of limitations and must be set up in the answer. Westcott v. Fargo, 61 N. Y. 542.

148 Code Civ. Proc. § 378, which changed the rule laid down in Fisher v. City of New York, 6 Hun, 64.

149 1 Enc. Pl. & Pr. 1.

150 Sweet v. Tuttle, 10 How. Pr. 40.

151 Code Civ. Proc. § 488.

152 Code Civ. Proc. § 498.

demurrer that the court has no jurisdiction and that the complaint fails to state a cause of action are not waived by failing to raise the objection by demurrer or answer.[153]

As examples of matters in abatement which constitute new matter and must be raised by answer where the objection does not appear on the face of the complaint, may be mentioned that plaintiff is not the real party in interest,[154] that another action is pending,[155] plaintiff's disability to sue,[156] misjoinder,[157] as well as non-joinder[158] of parties, that action is premature,[159] existence of an adequate remedy at law,[160] and misnomer.[161]

[153] Code Civ. Proc. § 499.

[154] Coffin v. Grand Rapids Hydraulic Co., 46 State Rep. 851; Fourth Nat. Bank v. Mahon, 38 App. Div. 198; Spooner v. Delaware, L. & W. R. Co., 115 N. Y. 22.

[155] Wright v. Maseras, 56 Barb. 521; White v. Talmage, 35 Super. Ct. (3 J. & S.) 223; Remington v. Walker, 21 Hun, 322; Nealis v. American Tube & Iron Co., 76 Hun, 220, 59 State Rep. 120.

[156] Perkins v. Stimmel, 114 N. Y. 359; Pyro-Gravure Co. v. Staber, 30 Misc. 658; Dillaye v. Parks, 31 Barb. 132. So held in an action by a foreign corporation. Abram French Co. v. Marx, 10 Misc. 384; O'Reilly v. Greene, 18 Misc. 423.

[157] But under the Code, the joinder of a defendant, not liable at all in the action, is no defense to any one but the party not liable. Suydam v. Barber, 18 N. Y. 468. See, also, Adams v. Slingerland, 84 N. Y. Supp. 323.

[158] Parker v. Paine, 37 Misc. 768; Pickett v. Metropolitan Life Ins. Co., 20 App. Div. 114; Ripple v. Gilborn, 8 How. Pr. 456; Abbe v. Clark, 31 Barb. 238.

When a defect of parties defendant is not pleaded, and the necessity for other parties to the action appears on the trial, the plaintiff not being guilty of laches, the suit should not be dismissed, but ordered to stand over on proper terms to enable plaintiff to bring the necessary parties before the court. Pondir v. New York, L. E. & W. R. Co., 31 Abb. N. C. 29, 72 Hun, 384, 55 State Rep. 63.

[159] Smith v. Holmes, 19 N. Y. 271; Mack v. Burt, 5 Hun, 28.

[160] Town of Mentz v. Cook, 108 N. Y. 504; Rochester & Kettle Falls Land Co. v. Roe, 8 App. Div. 360; Converse v. Sickles, 16 App. Div. 49, 78 State Rep. 1080; Gould v. Edison Electric Illuminating Co., 29 Misc. 241; Watts v. Adler, 130 N. Y. 646; Thomas v. Grand View Beach R. Co., 76 Hun, 601, 58 State Rep. 256; Lough v. Outerbridge, 143 N. Y. 271; Tucker v. Manhattan Ry. Co., 78 Hun, 439.

[161] Traver v. Eighth Ave. R. Co., 4 Abb. App. Dec. 422, 6 Abb. Pr., N. S., 46, 3 Keyes, 497.

The proper method of raising a question of jurisdiction as to the subject-matter of an action, where it does not appear on the face of the complaint, is by answer.[162] But in this state, under the Code, objections to the jurisdiction of the subject matter are not waived, though not taken by demurrer or answer, provided that such objection is that "no" court has jurisdiction.[163]

§ 866. Contents and sufficiency in general.

A denial when properly pleaded does not "state" any facts: it simply "denies" facts. A defense of new matter, on the other hand, does not deny any facts but states new facts.[164] The new matter constituting a defense must be stated "in ordinary and concise language, without repetition."[165] The meaning of the phrase quoted has already been considered with reference to pleadings in general and hence the form of the statement will not be further considered. The substance of an answer stating new matter as a defense must consist of facts, which, if true, will bar the action, or so much of it as is attempted to be answered.[166] A defense may be struck out on motion where the facts are such as may be proved under the general denial embodied in the answer.[167]

At common law new matter of defense was required to give color—that is, give plaintiff credit for having an apparent, or prima facie, right of action independently of the matter disclosed in the plea to destroy it. But under the Codes, in order to avoid the cause of action alleged, defendant need not confess it; he may aver that if any such contract as alleged was made, it was made jointly with others.[168] So an answer

[162] Atlantic & Pac. Telegraph Co. v. Baltimore & O. R. Co., 87 N. Y. 355; Johnson v. Adams Tobacco Co., 14 Hun, 89; Werthim v. Page, 10 Wkly. Dig. 26; Heenan v. New York, W. S. & B. Ry. Co., 34 Hun, 602.

[163] De Bussierre v. Holladay, 55 How. Pr. 210, 216; Popfinger v. Yutte, 102 N. Y. 38.

[164] Pom. Code Rem. § 687.

[165] Code Civ. Proc. § 500.

[166] Gihon v. Levy, 9 Super. Ct. (2 Duer) 176; Carter v. Koezley, 14 Abb. Pr. 147, 22 Super. Ct. (9 Bosw.) 583.

[167] Von Hagen v. Waterbury Mfg. Co., 22 Misc. 580.

[168] Taylor v. Richards, 22 Super. Ct. (9 Bosw.) 679.

in an action for injury caused by a defect in a sidewalk, in terms "if the plaintiff fell upon the streets or sidewalks of the village" "the same was caused solely by the contributory negligence of plaintiff," is not obnoxious to demurrer as a hypothetical denial.[169] In other words, defendant cannot be required to admit the facts alleged so as to preclude him from denying them on the trial. It is only for the purposes of the issue formed on the new matter that defendant must admit, or rather that he is, by setting up the new matter, deemed to admit, the truth of the allegations avoided thereby.[170]

A denial, general or specific, may not be pleaded in the same paragraph of an answer which sets up an affirmative defense, not including a counterclaim, as forming a part of that defense, since it necessarily admits and avoids the cause of action alleged in the complaint.[171]

—— **Defenses arising after commencement of suit.** Any defense existing at the time of answering, may be inserted in the answer.[172]

—— **Matters in abatement.** The facts constituting new matter in abatement must be set forth in a plain and concise manner. A defense in abatement must be separate and distinct from other defenses in the answer.[173] The plea at common law was required to not only point out the error of the plaintiff, but also to show him how it might be corrected, or in other words it was required to give the plaintiff a better writ.

An answer setting up a defect of parties should give the names of the parties omitted, and show that they are alive

169 Wiley v. Village of Rouse's Point, 86 Hun, 495, 67 State Rep. 519.

170 Ketcham v. Zerega, 1 E. D. Smith, 553; Brown v. Ryckman, 12 How. Pr. 313.

171 Zacharias v. French, 10 Misc. 202, 63 State Rep. 176, 24 Civ. Proc. R. (Scott) 88; 1 Ann. Cas. 72; State of South Dakota v. McChesney, 87 Hun, 293, 68 State Rep. 442; White v. Koster, 89 Hun, 483, 69 State Rep. 769; Green v. Brown, 22 Misc. 279; Sanford v. Rhoads, 39 Misc. 548.

Denials should not be incorporated even by reference. De Witt v. Brill, 6 Misc. 44, 56 State Rep. 616; Burkert v. Bennett, 35 Misc. 318.

172 Willis v. Chipp, 9 How. Pr. 568; Lansing v. Ensign, 62 How. Pr. 363; Bronner Brick Co. v. M. M. Canda Co., 18 Misc. 681.

173 Chaffee v. Morss, 67 Barb. 252, 2 Hun, 602, 5 Thomp. & C. 708.

and within the jurisdiction of the court.[174] It is insufficient to allege that other persons whose names are not given are unknown to the defendant but are known to the plaintiff and are necessary parties.[175] But an answer setting up the nonjoinder of third persons, sufficiently alleges they are still living, if it alleges that they reside at a place named.[176]

An answer setting up plaintiff's disability to sue, must clearly state the nature of the infirmity in plaintiff's right.[177]

An answer setting up the pendency of another action should state when the former action was commenced and in what court, and that it is still pending; and it must clearly allege or show that the cause of action in the first suit is identical with that in the second.[178] A proper form is as follows: "That at the time of the commencement of this action another action was pending in the ——— court in and for the county of ——— in this state, between the same parties as are parties in this action, and for the same cause of action as that set forth in the complaint herein, which action is still undetermined and is now at issue."

If plaintiff is not the real party in interest, the facts should be set forth showing why he is not the real party in interest and who is the real party in interest.[179]

An answer setting up want of jurisdiction of the court in which suit is brought, should show another court having jurisdiction of the matter in litigation, and, if the lack of residence necessary to confer jurisdiction is relied on, the answer

[174] Ralli v. White, 21 Misc. 285; Mittendorf v. New York & H. R. Co., 58 App. Div. 260; Stiefel v. Berlin, 28 App. Div. 103; Holt v. Streeter, 74 Hun, 538, 57 State Rep. 193; Palmer v. Field, 76 Hun, 229, 59 State Rep. 123; Fowler v. Kennedy, 2 Abb. Pr. 347; Weigand v. Sichel, 4 Abb. App. Dec. 592, 33 How. Pr. 174, 3 Keyes, 120; Woodhouse v. Duncan, 106 N. Y. 527.

Contra,—as to showing that they are alive and within jurisdiction. Prosser v. Matthiessen, 26 Hun, 527, 63 How. Pr. 157.

[175] Humbert v. Abeel, 7 Civ. Proc. R. (Browne) 417; Maxwell v. Pratt, 24 Hun, 448.

[176] Taylor v. Richards, 22 Super. Ct. (9 Bosw.) 679; Lefferts v. Silsby, 54 How. Pr. 193.

[177] Burnside v. Matthews, 54 N. Y. 78.

[178] Hadden v. St. Louis, I. M. & S. R. Co., 57 How. Pr. 390.

[179] Wenk v. City of New York, 81 N. Y. Supp. 583.

should not only show such want of residence, but also state defendant's place of residence, as by stating that "at the commencement of this action this defendant was not a resident of this county but was a resident of ———, in the county of ———." If plaintiff has an adequate remedy at law, the form of the answer may be as follows: "That the plaintiff has an adequate remedy at law for damages against this defendant, who is financially solvent and able to respond in damages for the breach of any contract to which he is a party; and that this plaintiff cannot maintain this action in equity by reason of such facts."[180]

The defense of misnomer may be stated as follows: "That the true name of the plaintiff (or defendant) is ——— and not ——— in which name he sues (or is sued).

§ 867. Partial defenses.

Any partial defense which could not be proved unless pleaded, e. g. part payment, may be pleaded as a separate defense.[181] The Code provides that a partial defence may be set forth, but it must be expressly stated to be a partial defense to the entire complaint, or to one or more separate causes of action, therein set forth; and that matter tending only to mitigate or reduce damages, in an action to recover for the breach of a promise to marry, or for a personal injury, or an injury to property, is a partial defense, within the meaning of the section.[182] Thus while a plea of justification in an action for libel, may relate to portions only of the publication, it must be specially pleaded as a partial defense or in mitigation.[183] Unless a partial defense is pleaded as such, it will be assumed on demurrer that the facts are pleaded as a complete defense.[184] So an allegation of an answer cannot be upheld

[180] This form is taken from Green v. Stewart, 19 App. Div. 201.

[181] Houghton v. Townsend, 8 How. Pr. 441; Loosey v. Orser, 17 Super. Ct. (4 Bosw.) 391.

Likewise the statute of limitations. Maxon v. Delaware, L. & W. R. Co., 48 Hun, 172.

[182] Code Civ. Proc. § 508.

[183] Sawyer v. Bennett, 49 State Rep. 774, 20 N. Y. Supp. 835.

[184] Thompson v. Halbert, 109 N. Y. 329; Mason v. Dutcher, 67 State

on demurrer as in mitigation of damages where it is not stated that it is pleaded as a partial defense.[185] But it has been held that if it is self-evident on its face that the defense is only a partial defense, it is not demurrable.[186] The same facts may be pleaded as a complete and a partial defense provided they are separately stated and numbered.[187] Thus it is proper to say "As and for a second and complete as well as partial answer and defense, this defendant alleges," etc.

Unless a defense or counterclaim is interposed as an answer to the entire complaint, it must distinctly refer to the cause of action which it is intended to answer.[188] But where a separate defense cannot under any possibility refer to any but a particular cause of action set out in the complaint, it will be deemed to "distinctly refer" to such cause of action although it does not state upon its face that it is pleaded as a defense to that cause of action.[189]

—— **Mitigating circumstances in an action for a wrong.** Before the Codes, a plea of justification in an action of libel or slander, was conclusive evidence of malice so that if a party alleged the truth but failed to prove it, the damages were necessarily enhanced by the plea and defendant was deprived of the benefit of any evidence not amounting to a justification but showing mitigating facts.[190] To remedy this supposed injustice, the old Code[191] provided that in libel and slander, "the defendant may in his answer allege both the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages, and whether he prove the justification or not, he may give in evidence the

Rep. 590, 24 Civ. Proc. R. (Scott) 345; Mattice v. Wilcox, 36 State Rep. 914, 13 N. Y. Supp. 330.

185 Hathorn v. Congress Spring Co., 44 Hun, 608, 8 State Rep. 511.

186 Howd v. Cole, 74 Hun, 121.

187 Zacharias v. French, 10 Misc. 202, 63 State Rep. 176, 24 Civ. Proc. R. (Scott) 88, 1 Ann. Cas. 72.

188 Code Civ. Proc. § 507; Woods v. Reiss, 78 Hun, 78.

189 Crasto v. White, 52 Hun, 473, 23 State Rep. 535, 17 Civ. Proc. R. (Browne) 46; Willis v. Taggard, 6 How. Pr. 433.

190 See the leading cases of Bush v. Prosser, 11 N. Y. (1 Kern.) 352 and Spooner v. Keeler, 51 N. Y. 527.

191 Code Pro. § 165.

mitigating circumstances." The present Code extends the rule to practically all actions for a wrong by providing as follows: "In an action to recover damages for the breach of a promise to marry, or for a personal injury, or an injury to property, the defendant may prove, at the trial, facts, not amounting to a total defense, tending to mitigate or otherwise reduce the plaintiff's damages, if they are set forth in the answer, either with or without one or more defenses to the entire cause of action."[192] For instance, the defendant, in an action for libel, may allege that the plaintiff had written and published certain irritating matters of defendant or of his newspaper.[193] So facts tending to prove absence of actual malice may be pleaded as a partial defense in libel, since they go in mitigation of damages.[194]

Matter in mitigation must be separately stated from matter in justification[195] and should be stated as pleaded in mitigation[196] but matter in justification may be re-alleged in mitigation of damages[197] as in the following form: "in mitigation of any damages to which the plaintiff might otherwise appear entitled by reason of the publication of said supposed libellous article, this defendant * * * repeats and renews, all and singular, the matters stated under the second defense herein; and will give evidence thereof in mitigation of damages, as well as in justification."[198] A mere general averment of the truth of a libel does not suffice as a defense, nor as a partial defense as in mitigation of damages, unless the libel consists

[192] Code Civ. Proc. § 536. This provision is practically reiterated in section 508 of the Code.

When several separate and distinct things are charged in an action of slander or libel, the defendant may justify as to one, though he fail as to the others. Lanpher v. Clark, 149 N. Y. 472.

[193] Xavier v. Oliver, 80 N. Y. Supp. 225.

[194] Hawk v. American News Co., 67 State Rep. 501, 24 Civ. Proc. R. (Scott) 255, 33 N. Y. Supp. 848.

[195] Fink v. Justh, 14 Abb. Pr., N. S., 107; Follett v. Jewitt, 11 N. Y. Leg. Obs. 193.

[196] Fry v. Bennett, 7 Super. Ct. (5 Sandf.) 54; Fink v. Justh, 14 Abb. Pr., N. S., 107; Hager v. Tibbits, 2 Abb. Pr., N. S., 97.

Contra,—Bennett v. Matthews, 64 Barb. 410.

[197] Howard v. Raymond, 11 Abb. Pr. 155.

[198] From form in Howard v. Raymond, 11 Abb. Pr. 155.

in itself of a specific statement of the facts, but the particular facts which show the publication to be true must be set out.[199]

Matter in mitigation cannot be given in evidence unless pleaded.[200]

§ 868. Joinder of defenses.

The Code provides as follows: "A defendant may set forth in his answer, as many defenees or counterclaims, or both, as he has, whether they are such as were formerly denominated legal or equitable. Each defenee or counterclaim must be separately stated and numbered."[201] Thus, one may justify an assault as committed in self-defense, or in defense of his possession of his real estate.[202] So matters in abatement and in bar may be joined in one answer.[203] Under this rule, defendant may plead even inconsistent grounds of defense.[204] For instance, a defendant sued by a corporation for a subscription to its stoek, may interpose the inconsistent defenses that it was incorporated for an illegal purpose, and that it has not been incorporated at all.[205] So the fact that there is in the answer a general denial does not prevent defendant from availing himself of the defense of justification.[206]

—— **Mode of stating separate defenses.** While distinet defenses must be separately stated, no formal eommencement or conclusion is required to mark each separate defense[207] but

199 Shanks v. Stumpf, 23 Misc. 264; Brush v. Blot, 16 App. Div. 80; McKane v. Brooklyn Citizen, 53 Hun, 132.

200 Gray v. Brooklyn Union Pub. Co., 35 App. Div. 286; Ball v. Evening Post Pub. Co., 38 Hun, 11.

201 Code Civ. Proc. § 507.

202 Johnson v. Gibson, 23 Wkly. Dig. 433.

203 Hamburger v. Baker, 35 Hun, 455; Sweet v. Tuttle, 14 N. Y. (4 Kern.) 465; Gardner v. Clark, 21 N. Y. 399.

204 Goodwin v. Wertheimer, 99 N. Y. 149; Siriani v. Deutsch, 12 Misc. 213, 67 State Rep. 892; Conklin v. John H. Woodbury Dermatological Inst., 37 App. Div. 610, 29 Civ. Proc. R. (Kerr) 42; Bruce v. Burr, 67 N. Y. 237; Societa Italiana Di Beneficenza v. Sulzer, 138 N. Y. 468; Kelly v. Supreme Council Catholic Mut. Benefit Ass'n, 46 App. Div. 79.

205 United States Vinegar Co. v. Schlegel, 143 N. Y. 537.

206 Kingsley v. Kingsley, 79 Hun, 569, 61 State Rep. 537.

207 Bridge v. Payson, 7 Super. Ct. (5 Sandf.) 210; Lippencott v. Goodwin, 8 How. Pr. 242.

it is customary to commence with such words as "And for a second and further defense" or "Second. Further answering, and as a further and separate defense." To commence each separate defense with the words, "And defendant further says,"[208] is not sufficient. Nor is it sufficient to simply number the separate paragraphs of the answer.[209]

Each defense must be complete in itself and cannot be helped out by allegations in another part of the answer unless incorporated by appropriate words of reference, or necessary implication.[210] One defense may not, by averment merely, be incorporated bodily into another; only facts which are necessary and pertinent to complete the allegations of new matter therein may be so incorporated.[211] But if several defenses in an answer, separately stated and numbered, are treated on the trial as forming one entire defense or answer, without objection, they should be so regarded after verdict.[212]

Forms of defenses of new matter.

A few forms of the most common defenses are given below:

—— Defect of parties.

That the several supposed promises and undertakings in the complaint herein, if any such were made, were, and each of them was, made by the said defendant jointly with one X, who is still living, to wit at ———, and within reach of the process of this court.

—— Infancy of plaintiff.

That plaintiff is an infant under the age of twenty-one years and has sued herein in his own person without the appointment of any guardian.

—— Accord and satisfaction.

That after making the promises and undertakings alleged in the complaint herein, and before the commencement of this suit, to wit, on

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The formal words "as a separate defense" need not be used. Kager v. Brenneman, 33 App. Div. 452, per Barrett, J.

208 Benedict v. Seymour, 6 How. Pr. 298.

209 Fay v. Hauerwas, 26 Misc. 421; Jex v. City of New York, 111 N. Y. 339.

210 Boyd v. McDonald, 35 State Rep. 484; Sbarboro v. Health Dept., 26 App. Div. 177; Brookline Nat. Bank v. Moers, 19 App. Div. 155, 79 State Rep. 997; Craft v. Brandow, 24 Misc. 306; Dexter v. Alfred, 46 State Rep. 789, 19 N. Y. Supp. 770.

211 Garrett v. Wood, 27 App. Div. 312.

212 Ayrault v. Chamberlain, 33 Barb. 229.

———, at ———, the said defendant delivered to the said plaintiff the following goods (describe the goods), and the said plaintiff then and there received and accepted the same in full satisfaction and discharge of the said several promises and undertakings mentioned in the complaint herein, and of all the damages sustained by the said plaintiff by reason of the nonperformance thereof.

—— Statute of frauds.

That the agreement or contract of guaranty mentioned and referred to in the third paragraph of the complaint herein is an agreement, contract or promise to answer for the debt or default of another person, and that no memorandum of said agreement or contract was ever made in writing, and that said agreement is, therefore, void under the statute of frauds.[213]

— Statute of limitations.

That the causes of action in the complaint herein did not, nor did any or either of them, accrue at any time within six years next before the commencement of this action.

—— Payment.

That after the making of the contract alleged in the complaint herein, and before the commencement of this suit, the defendant on the ——— day of ———, at ———, paid to the said plaintiff the sum of ——— dollars, lawful money, and the said plaintiff received and accepted the sum in full payment and discharge of the claim alleged in the complaint herein.

—— Payment by giving note.

That on ——— day of ———, at ———, defendant delivered to the plaintiff a certain promissory note, of which the following is a copy: (here insert copy of the note); which said note the said plaintiff then and there received and accepted of and from the said defendant in full satisfaction and discharge of the claim set forth in the plaintiff's declaration in this cause.

—— Estoppel.

That the plaintiff ought not to maintain his action because (here state the matter in estoppel).

—— Estoppel by former judgment.

That on the ——— day of ———, the said plaintiff recovered a judgment in the ——— court in the county of ——— against the said defendants for the sum of ——— (or insert other relief obtained) for the same cause of action as that set forth in the complaint herein.

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[213] This form is taken from Brookline Nat. Bank v. Moers, 19 App. Div. 155.

—— Tender.

That before the commencement of this suit, on the ——— day of ——— at ———, defendant was ready and willing, and then and there tendered and offered to pay to plaintiff the sum of ——— dollars, in gold, in payment of the claim alleged in the complaint herein, but defendant refused, then and there, to receive said money; and always since said time, said defendant has been ready and willing, and still is ready and willing, to pay the said sum of money to the said plaintiff, and now brings the sum to court here to pay to the said plaintiff if he will accept the same.

—— Defense that contract is a wager.

That at the times of making the supposed contracts in the complaint contained, the defendant was not a dealer in pork, nor did he ever hold, possess, or control the pork mentioned in the supposed contracts, nor any part thereof, all which the plaintiff well knew, as the defendant is informed and believes; that it then was not the intention of the defendant to make any actual sale or delivery of pork to the plaintiff, nor was it the intention of the plaintiff actually to buy or receive any pork from the defendant, as the defendant is informed and believes; that it was the mutual design and intention of both the plaintiff and the defendant, at the making of said supposed contracts, that the same should not be specifically performed in whole or in part, but on the contrary, that at the maturity of said supposed contracts the differences between the then market value of the pork therein mentioned, and the price of the same fixed in said supposed contracts, should be paid by the one party to the other, as performance or satisfaction of said supposed contracts; that the market price of pork in the month of September, then future, was at the time of the making of said supposed contracts are unknown and contingent event and a chance, and the said supposed contracts were not actual bargains and agreements for the sale of the actual property, but were mere wagers on such future market price of pork, and on the chance of such future price, and were gambling transactions, and the defendant insists that said supposed contracts an unknown and contingent event and a chance, and the said are illegal, invalid, and void, and are contrary to the statute in such case made and provided, and repugnant to the common law.[214]

ART. IV. COUNTERCLAIMS AND SET-OFFS.

§ 869. Historical.

Originally at common law, no such defense or proceeding, on the part of a defendant, as a set-off, recoupment or counter-

[214] This form is taken from Cassard v. Hinman, 14 Super. Ct. (1 Bosw.) 207.

claim was allowed.[215] However, at an early day, the statutes provided for the "set-off" in actions at law of mutual "debts." But under such statutes unliquidated damages could not be made the subject of a set-off which was defined as a money demand by the defendant against the plaintiffs, independent of and unconnected with the plaintiff's cause of action.[216] The term "set-off," as used in the Revised Statutes, is practically abolished since the repeal thereof, and the enactment of the present Code. The court of chancery created, however, an "equitable set-off" which was broader and more comprehensive than that administered by the courts of law and which allowed the setting off of unliquidated damages in certain instances.[217]

The doctrine of "recoupment of damages" had its inception in the case law. A recoupment was allowed where damages resulted from a breach of the very same contract sued upon.[218] In this respect, it differed from the statutory set-off which was necessarily a demand arising on a different contract from the one in suit.[219] Recoupment was further distinguished from set-off in that defendant could have no judgment for the surplus, even though his damages exceeded those proven by the plaintiff.[220]

The word "counterclaim" first appeared in an amendment of the old Code in 1852 as a substitute for the word "set-off" in the provision allowing defendant to set forth in his answer a statement of any new matter constituting a defense or "set-off."[221] This statutory counterclaim not only embraces both set-offs and recoupments as they were understood prior to 1852[222] but is broader and more comprehensive than either.[223]

215 Pom. Code Rem. § 729.

216 Boston Mills v. Eull, 6 Abb. Pr., N. S., 319.

217 See post, p. 969.

218 Seymour v. Davis, 4 Super. Ct. (2 Sandf.) 239; Deming v. Kemp, 6 Super. Ct. (4 Sandf.) 147.

219 Pom. Code Rem. § 731.

220 Sickels v. Pattison, 14 Wend. 257.

221 For a full and complete history of the various Code provisions relating to counterclaims, see note on counterclaim by Mr. Throop in 3 Civ. Proc. R. (Browne) 212-227.

222 Vassear v. Livingston, 13 N. Y. (3 Kern.) 248; Pattison v. Richards, 22 Barb. 146.

It secures to the defendant the full relief which a separate action at law, or a bill in chancery, or a cross bill would have secured him on the same state of facts.[224] It may be for either liquidated or unliquidated damages,[225] and for unliquidated damages arising on a contract different from the contract on which the action is brought.[226]

§ 870. Set-off in equity.

The right to interpose a set-off depends at law on the statute but in equity a set-off may be allowed beyond the statute[227] when reason and justice require it in cases where courts of law will be unable to grant relief.[228] But the mere existence of reciprocal and independent demands is not sufficient to authorize a set-off in equity when not allowable by the statute. One debt must have been contracted on the faith of the other, or one to have been deducted from the other, or there must have been some intervening equity,[229] such as insolvency.[230] Thus, when two claims are connected, although one

The distinction between the three is not, however, entirely abandoned. Elwell v. Skiddy, 77 N. Y. 282.

223 Vassear v. Livingston, 13 N. Y. (3 Kern.) 256; Beardsley v. Stover, 7 How. Pr. 294.

224 Gleason v. Moen, 9 Super. Ct. (2 Duer) 642.

225 Schubart v. Harteau, 34 Barb. 447.

226 Lignot v. Redding, 4 E. D. Smith, 285.

227 Smith v. Felton, 43 N. Y. 419; O'Dougherty v. Remington Paper Co., 1 State Rep. 526, note.

228 Hatch v. City of New York, 82 N. Y. 436.

229 Pond v. Harwood, 139 N. Y. 111; Cummings v. Morris, 25 N. Y. 625.

230 Clark v. Vilas Nat. Bank, 22 App. Div. 605; Kilby v. First Nat. Bank of Carthage, 32 Misc. 370; Davidson v. Alfaro, 80 N. Y. 660; Lindsay v. Jackson, 2 Paige, 581; Rothschild v. Mack, 42 Hun, 72.

But if defendant had knowledge of the insolvency at the time of entering into his contract, or if he is sufficiently secured by a specific lien, he can assert no equity based on the fact of insolvency. Elliott v. Smith, 77 Hun, 116.

So purchase of a claim against plaintiff after suit brought without consideration and with knowledge of his insolvency, will not entitle defendant to a set-off. Pond v. Harwood, 139 N. Y. 111.

As to the right of a depositor in a bank to set off his deposit against a debt due on the bank, on the insolvency of the bank, see collection of cases in 2 Abb. Cyc. Dig. 351-353.

is unliquidated, set-off should be compelled, when by reason of the insolvency of either debtor, satisfaction cannot be obtained.[231] So equity will permit a debt not yet due to be set off when there are circumstances which would render it inequitable to deny the set-off.[232] And claims will be regarded as due, notwithstanding the absence of a technical demand, when equitable considerations require that they shall be applied each to the other.[233]

§ 871. The statute.

A counterclaim must (1) tend, in some way, to diminish or defeat the plaintiff's recovery, and must (2) be a cause of action against the plaintiff, or, in a proper case, against the person whom he represents, and in favor of the defendant, or of one or more defendants, between whom and the plaintiff a separate judgment may be had in the action. The cause of action must furthermore be either (1) a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action, or (2) in an action on contract, any other cause of action on contract existing at the commencement of the action.[234]

—— **Liberal construction.** The policy of the law has been to allow the parties to bring into a single action, so far as it can be conveniently done, all the controversy between them for final and complete adjustment. The statute of set-off and the doctrine of recoupment were, from time to time, extended and enlarged in view of this policy; and the statute of counterclaim which is still further advanced in the same direction, should be liberally construed to accomplish its benign object.[235]

§ 872. Successive counterclaims.

Defendant cannot successively plead the same counterclaim to several independent actions brought by the same plaintiff.[236]

231 Littlefield v. Albany County Bank, 97 N. Y. 581.
232 Jordan v. National Shoe & Leather Bank, 74 N. Y. 467.
233 Hughitt v. Hayes, 136 N. Y. 163.
234 Code Civ. Proc. § 501.

§ 873. General requisites of counterclaim.

The cause of action which may be set up in a counterclaim, may be either legal or equitable,[237] but must generally be one on which an action could have been maintained against the plaintiff or plaintiffs alone at the time when plaintiff's action was commenced,[238] and of which the courts of this state would have jurisdiction.[239] Under the rule that the cause of action must be one on which defendants could recover in an independent action, a cause of action against the state cannot be the subject of a counterclaim[240] nor can a cause of action barred by the statute of limitations.[241] But this rule is subject to the exception that though the remedy may temporarily be suspended, so that no independent action could be maintained, yet if a good cause of action exists, it may be used as a counterclaim.[242] Thus a justice's judgment may be used as a counterclaim although the action is brought in the same county within five years after the rendition of the judgment.[243] Furthermore, it is essential to a counterclaim that it exist in the hands of the defendants who set it up, at the time of the commencement of the action.[244]

235 More v. Rand, 60 N. Y. 208.

236 Tuckerman v. Corbin, 66 How. Pr. 404.

237 Currie v. Cowles, 19 Super. Ct. (6 Bosw.) 452; Hicksville & C. S. B. R. Co. v. Long Island R. Co., 48 Barb. 355.

238 Rogers v. King, 66 Barb. 495.

239 Cragin v. Lovell, 88 N. Y. 258.

240 People v. Dennison, 84 N. Y. 272; People v. Corner, 59 Hun, 299.

241 De Lavallette v. Wendt, 75 N. Y. 579; Morris v. Budlong, 78 N. Y. 543. But in an action on a purchase-money note damages for breach of warranty of the goods sold may be counterclaimed, although the claim for damages is barred by the statute. Maders v. Lawrence, 49 Hun, 360, 17 State Rep. 999. This decision was based on the theory that it would be unjust to refuse to consider the counterclaim where it arose out of the same transaction as the cause of action alleged in the complaint, so that if the one was barred the other was also barred.

242 Taylor v. City of New York, 82 N. Y. 10; Cornell v. Donovan, 14 Daly, 295.

243 Clark v. Story, 29 Barb. 295.

244 Moody v. Steele, 11 Civ. Proc. R. (Browne) 205, 3 State Rep. 269; Mayo v. Davidge, 44 Hun, 342, 8 State Rep. 844, 26 Wkly. Dig. 279; Bernheimer v. Hartmayer, 50 App. Div. 316.

Facts which controvert plaintiff's claim and serve to defeat it as a cause of action are inconsistent with the idea of a counterclaim, which is a separate and distinct cause of action balancing in whole or in part that asserted by plaintiff.[245] Thus, the defense of usury cannot be set up as a counterclaim[246] but in an action to foreclose a mortgage, the mortgagor, who is owner of the land mortgaged, may set up as a counterclaim that the mortgage is void for usury, and is a cloud upon his title, and ask that it be canceled.[247]

—— **Tendency to diminish or defeat plaintiff's recovery.** The first requisite of a counterclaim is that it "must tend, in some way, to diminish or defeat the plaintiff's recovery."[248] This Code rule merely reiterates an early decision of the court of appeals[249] which held that the damages of the plaintiff and of the defendant must be reciprocal in order to allow a counterclaim. For example, a junior lienor made a defendant in a foreclosure suit, where no personal judgment is asked against him, cannot set up his claim as a counterclaim since it would not "tend to diminish or defeat" the plaintiff's recovery as against the mortgagor.[250] But if a junior mortgagee sues to foreclose and makes the senior mortgagee a defendant, the latter may seek to foreclose his mortgage, by way of counterclaim.[251] For the same reason, a claim for damages from breach of contract cannot be set up as a counterclaim in a suit to enjoin the interference and violation of the contract.[252]

—— **Cause of action against plaintiff or person whom he represents and in favor of defendant or one or more defend-**

245 Walker v. American Cent. Ins. Co., 143 N. Y. 167; Dunham v. Bower, 77 N. Y. 76.

246 Prouty v. Eaton, 41 Barb. 409; National Bank of Auburn v. Lewis, 81 N. Y. 15.

247 Myers v. Wheeler, 24 App. Div. 327.

248 Code Civ. Proc. § 501; National Fire Ins. Co. v. McKay, 21 N. Y. 191; City of Schenectady v. Furman, 39 State Rep. 975; Reilly v. Lee, 85 Hun, 315, 66 State Rep. 460; Eckert v. Gallien, 24 Misc. 485.

249 National Fire Ins. Co. v. McKay, 21 N. Y. 191.

250 Lipman v. Jackson Architectural Iron Works, 128 N. Y. 58.

See, also, Merchants' Nat. Bank v. Snyder, 52 App. Div. 606.

251 Metropolitan Trust Co. v. Tonawanda Valley & C. R. Co., 18 Abb. N. C. 368, 43 Hun, 521, 7 State Rep. 90.

252 Sugden v. Magnolia Metal Co., 58 App. Div. 236.

ants between whom and plaintiff a separate judgment may be had. Secondly, the cause of action must be one (1) against the plaintiff[253] or, (2) in a proper case, against the person whom he represents, and (3) in favor of the defendant,[254] or (4) one or more defendants between whom and the plaintiff a separate judgment may be had in the action.[255] The phrase "the person whom he represents" is intended to apply to assignees, executors, etc., but it includes also any case where a plaintiff who sues as the representative of another, is liable to be charged with counterclaims against the latter.[256] The phrase "in favor of the defendant or of one or more defendants, between whom and the plaintiff a separate judgment may be had in the action," is practically the same as employed in the old Code,[257] which changed the rule of the Revised Statutes that if there were two or more defendants, the demand set off must be due to all of them jointly. It permits a counterclaim in favor of one only of several defendants, if the nature of the alleged liability is such as not to preclude a separate judgment, as for instance where the one making the counterclaim is principal and the other surety. The fact that a joint judgment might be given does not exclude the counterclaim.[258] Under this rule, whenever a single defendant or all the defendants jointly may recover against one or some of the plaintiffs and not against all, or whenever one or some of the defendants and not all may recover against the single plaintiff or all the plaintiffs jointly, or, whenever both these possibilities are combined, a counterclaim may be

[253] Wiltsie v. Northam, 16 Super. Ct. (3 Bosw.) 162; Cumings v. Morris, 16 Super. Ct. (3 Bosw.) 560; Duncan v. Stanton, 30 Barb. 533; Boyd v. Foot, 18 Super. Ct. (5 Bosw.) 110.

In an action on a bond defendant cannot counterclaim on a contract cause of action against a firm of which plaintiff is a member. De Forest v. Andrews, 27 Misc. 145, 29 Civ. Proc. R. (Kerr) 250.

Facts showing a right against a co-defendant do not suffice. Stevens v. Orton, 18 Misc. 538, 77 State Rep. 792.

[254] Bates v. Rosekrans, 37 N. Y. 409.

[255] Code Civ. Proc. § 501.

[256] See Throop's note on counterclaim in 3 Civ. Proc. R. (Browne) 212, 215.

[257] Code Pro. § 150.

[258] Bathgate v. Haskin, 59 N. Y. 533; Coffin v. McLean, 80 N. Y. 560.

interposed against one or some of plaintiffs and not against all, and by one or some of the defendants and not by all.[259] The following rules have been deduced from this Code rule by Mr. Pomeroy:

1. If defendants are joint contractors and sued as such, no counterclaim can be made available which consists of a demand in favor of one or some of them.[260]
2. If defendants are jointly and severally liable, although sued jointly, a counterclaim consisting of a demand in favor of one or some of them may be interposed if otherwise unobjectionable.
3. A counterclaim in favor of one or more persons severally liable, where sued jointly, may be pleaded.
4. A counterclaim, existing in favor of one or more of codefendants, in an equitable suit, against whom different reliefs are demanded, may be interposed.
5. If plaintiffs have a joint right of action, a counterclaim against one or some of them cannot be allowed.
6. If plaintiffs who unite in one action have separate rights of action, a counterclaim may be set up against one or more of them.
7. If two or more plaintiffs sue jointly, but in fact the joinder is improper because as to some of them no right of action exists, a counterclaim may be interposed against one or more of the plaintiffs in whose favor a separate judgment could be rendered.
8. In equitable actions, a counterclaim in favor of one or some of defendants and against one or some of plaintiffs will be permissible as a general rule, since in equity the common law doctrine of joint right and liability does not generally prevail, and separate judgments or judgments conferring separate relief among parties is almost a matter of course.[261]

Thus a surety cannot set up as a counterclaim a cause of action in favor of his principal.[262] Nor can a joint debt be

[259] Pom. Code Rem. § 755.
[260] Carey v. Baldwin, 61 N. Y. Supp. 581.
[261] Pom. Code Rem. § 761.
[262] Lasher v. Williamson, 55 N. Y. 619; Sterne v. Talbott, 89 Hun, 368.

pleaded as a counterclaim against a demand of one of the joint debtors.[263]

§ 874. (Code, § 501, subd. 1) Connection between cause of action sued on and cause of action set up in counterclaim.

The first subdivision provides that a cause of action in favor of a defendant and against a plaintiff may be pleaded as a counterclaim in case it arises, (1) out of the contract set forth in the complaint; (2) out of the transaction set forth in the complaint; (3) or is connected with the subject of the action.

—— **Cause of action arising out of the contract set forth in the complaint.** If the action is based on a contract, another cause of action arising out of the same contract in favor of defendant may be set forth as a counterclaim. For instance, in an action by a purchaser in an executory contract for the sale of real estate, to recover back the amount paid by him on the contract on the ground of defective title, the defendant may aver readiness and tender of the deed, and set up a counterclaim for specific performance.[264]

—— **Cause of action arising out of same "transaction."** A cause of action arising out of the "contract or transaction" set forth in the complaint as the foundation of the plaintiff's claim, may be set up as a counterclaim. The meaning of the word "transaction," as herein used, is the difficult problem which confronts the practitioner. Some aid may be obtained in solving this question by reference to the decisions under another Code provision which authorizes joinder of causes of action provided they grow out "of the same transaction."[265] It is conceded that a transaction may be a contract but in asmuch as the word is used in addition to the word "contract," it should be construed as meaning something broader than "contract."[266] It has been held to mean some commer-

[263] Halliburton v. Clapp, 1 App. Div. 71; Spofford v. Rowan, 3 State Rep. 272.

[264] Moser v. Cochrane, 13 Daly, 159, 21 Wkly. Dig. 545; Moser v. Cochrane, 107 N. Y. 35.

[265] See ante, pp. 65-70.

[266] Sheehan v. Pierce, 70 Hun, 22, which held that in an action for

cial or business negotiations, not a wrong by violence or fraud.[267] In the absence of any precise definition of the word, the decisions in particular actions will be considered in the following order: actions on contract where counterclaim is based on tort; actions on tort where counterclaim arises from contract; and actions based on a tort when the counterclaim also arises from a tort.

If plaintiff's cause of action is on contract, a counterclaim for damages arising from the tort cannot ordinarily be interposed.[268] For instance, in an action to recover rent of premises leased, an answer setting up negligence, trespass or other tort as a counterclaim is not allowable.[269] There are cases, however, which hold that a tort may be sustained in an action based on a contract, as arising out of the same transaction;[270] especially where the tort may be waived, and recovery had on an implied contract.[271] Thus in an action on a bond given pursuant to a compromise, fraud in procuring the compromise may be set as a counterclaim as arising out of the same transaction.[272] So in an action to recover the price of goods or land sold, false and fraudulent representations inducing the execution of the contract may be set up as a counterclaim.[273] So a claim for conversion of collateral set up in an action to recover the debt secured thereby, arises out of the same transaction.[274]

slander, defendant could not plead a slander uttered on the same occasion because it could not be said to have arisen out of the "transaction" set forth in the complaint. Ter Kuile v. Marsland, 81 Hun, 420.

[267] Barhyte v. Hughes, 33 Barb. 320.

[268] Bell v. Lesbini, 4 Civ. Proc. R. (Browne) 367.

[269] Drake v. Cockroft, 4 E. D. Smith, 34, 1 Abb. Pr. 203, 10 How. Pr. 377; Edgerton v. Page, 20 N. Y. 281.

But defendant may counterclaim for an eviction before the expiration of the lease. Ludlow v. McCarthy, 5 App. Div. 517.

[270] Wadley v. Davis, 63 Barb. 500; Littman v. Coulter, 23 Abb. N. C. 60; Stuart v. Atlantic Dredging Co., 1 Month. Law Bul. 18.

[271] Harway v. Mayor of New York, 4 Thomp. & C. 167; Conyngham v. Shiel, 20 Misc. 590; Slade v. Montgomery, 53 App. Div. 343.

[272] Thomson v. Sanders, 118 N. Y. 252.

[273] Disbrow v. Harris, 122 N. Y. 362; Isham v. Davidson, 52 N. Y. 237; Farrell v. Krone, 24 Wkly. Dig. 89.

[274] Cass v. Higenbotam, 100 N. Y. 248.

Where the cause of action is based on a tort, a counterclaim, in form upon contract, is rarely allowed,[275] though it may be.[276] Thus, in an action against an agent for conversion of the proceeds of sales made by him for plaintiff, defendant has been permitted to set up a counterclaim for commissions, etc., arising out of the non-performance of the contract by plaintiff.[277] So in an action to recover damages for the conversion of a note and collaterals, defendant may interpose a counterclaim to recover the amount due on the note.[278] And it would seem that if the facts are such that an election is given to plaintiff to sue either in form on contract or on tort, and he sues as for a tort, defendant may counterclaim damages for the breach of the contract.[279]

A cause of action based on tort is rarely allowed as a counterclaim to a cause of action based on tort,[280] though permissible in a proper case.[281] For instance, where two wagons collide on the highway, and the owner of one wagon sues the owner of the other for damages, the defendant should be allowed to set up by way of counterclaim the damages sustained by himself from the collision, since arising from the same transaction.[282] On the other hand, it has been held that in an action to recover damages for an alleged assault, defendant cannot set up as a counterclaim an alleged assault made by the plaintiff on him at the same time,[283] and that defendant can not in an action for slander, set up a slander uttered by

[275] People v. Dennison, 84 N. Y. 272; Mairs v. Manhattan Real Estate Ass'n, 89 N. Y. 498; D'Auxy v. Dupre, 47 App. Div. 51; McQueen v. New, 86 Hun, 271; Haupt v. Ames, 26 App. Div. 550. It may be allowed, however. Savage v. City of Buffalo, 50 App. Div. 136.

[276] Savage v. City of Buffalo, 49 App. Div. 577.

[277] Ter Kuile v. Marsland, 81 Hun, 420; Crocker v. Fairbanks, 16 Wkly. Dig. 235. Contra,—Barker v. Platt, 15 Civ. Proc. R. (Browne) 52.

[278] Empire Dairy Feed Co. v. Chatham Nat. Bank, 30 App. Div. 476.

[279] Pom. Code Rem. § 788; Thompson v. Kessel, 30 N. Y. 383.

[280] Pattison v. Richards, 22 Barb. 143; Murden v. Priment, 1 Hilt. 75.

[281] Carpenter v. Manhattan Life Ins. Co., 93 N. Y. 552.

[282] Heigle v. Willis, 50 Hun, 588, 20 State Rep. 639. Contra,—Ryan v. Lewis, 3 Hun, 429.

[283] Schnaderbeck v. Worth, 8 Abb. Pr. 37; Prosser v. Carroll, 33 Misc. 428. Contra,—Murphy v. McQuade, 20 Misc. 671.

plaintiff in the course of the same conversation.[284] But the last two propositions of law are of doubtful authority, since, in a late case, the appellate division for the third department held that where a defendant sued for an alleged assault, denied the assault, he could allege as a counterclaim that plaintiff at the time and place set forth, assaulted defendant, and held that "where alleged causes of action, one set forth in the complaint and the other in defendant's answer as a counterclaim, are so connected that they must be determined on the same evidence, they should be litigated and determined in one action, although a recovery cannot be had in favor of either defendant or plaintiff without a finding that wholly defeats the alleged cause of action of the other."[285] The statutes contemplate two separate and distinct causes of action, one in favor of each party; and hence a defendant cannot base a counterclaim for damages for an assault on the same state of facts on which plaintiff bases his action for assault, since the Code requires the facts constituting counterclaim to be "new matter."[286] A tort preceding another tort, though the former was the pretext or excuse for perpetrating the latter, does not arise out of the same transaction nor is it connected with the subject of the action, especially where the one is an injury to property and the other an injury to the person.[287] It would seem that injuries to the person cannot arise out of the same transaction, but that injuries to property may.

Where the judgment sought is one other than for money, a counterclaim for damages is rarely allowed, though in replevin a counterclaim for damages has been permitted[288] as has a counterclaim for the value of repairs on the chattel, made at the request of plaintiff.[289]

In an action for a penalty, a counterclaim based on contract will not be allowed.[290] And in an action by a bank, there

[284] Sheehan v. Pierce, 70 Hun, 22.

[285] Deagan v. Weeks, 67 App. Div. 410.

[286] Prosser v. Carroll, 33 Misc. 428.

[287] Rothschild v. Whitman, 132 N. Y. 472.

[288] Brown v. Buckingham, 11 Abb. Pr. 387.

[289] Cooper v. Kipp, 52 App. Div. 250. But see Bernheimer v. Hartmayer, 50 App. Div. 316.

[290] Nash v. White's Bank of Buffalo, 13 Wkly. Dig. 141.

can be no counterclaim based on a cause of action for a penalty.[291]

—— **Cause of action "connected with the subject of the action."** The phrase "connected with the subject of the action" may have a broad signification, inasmuch as the connection may be slight or intimate, remote or near, and where the line shall be drawn, it is difficult to determine.[292] The subject of an action has been defined as either property or a violated right,[293] and as "the facts constituting the plaintiff's cause of action."[294] The latter definition is, however, not strictly accurate since it makes the cause of action and the subject of action identical. The term "subject of the action" has been held to be broader than the term "cause of action."[295] It is submitted that the phrase "subject of the action" should be construed as if it read "subject-matter of the action," and that it should be held to mean, as defined by Mr. Pomeroy, "the physical facts, the things real or personal, the money, lands, chattels, and the like, in relation to which the suit is prosecuted."[296] For instance, in an action for conversion of wood, defendant may set up as a counterclaim that plaintiff was guilty of waste in cutting the wood. The wood is the "subject" of the action.[297]

The counterclaim must have such a relation to, and connection with, the "subject of the action," that it will be just and equitable that the controversy between the parties

[291] Caponigri v. Altieri, 29 App. Div. 304.

[292] Carpenter v. Manhattan Life Ins. Co., 93 N. Y. 552.

See De Forest v. Andrews, 27 Misc. 145; Siebrecht v. Siegel-Cooper Co., 38 App. Div. 549.

[293] Glen & Hall Mfg. Co. v. Hall, 61 N. Y. 226.

[294] Lehmair v. Griswold, 40 Super. Ct. (8 J. & S.) 100; Rothschild v. Whitman, 132 N. Y. 472; Coddington v. Dunham, 35 Super. Ct. (3 J. & S.) 412.

[295] Ter Kuile v. Marsland, 81 Hun, 420.

[296] This definition occurs in section 475 of Pomeroy's Code Remedies in connection with his discussion of joinder of causes of action. But in his discussion of "subject of action" as used in the counterclaim statute (section 775), Mr. Pomeroy inclines to the idea that the phrase denotes "the plaintiff's principal primary right to enforce or maintain which the action is brought."

[297] Carpenter v. Manhattan Life Ins. Co., 93 N. Y. 552.

as to the matters alleged in the complaint and in the counterclaim should be settled in one action by one litigation; and that the claim of the one should be offset against, or applied upon, the claim of the other.[298]

This provision precludes a defendant from litigating an independent claim against his co-defendant, in no way connected with the subject-matter of the action.[299]

§ 875. (Code, § 501, subd. 2) Action on contract.

In an action on contract, a counterclaim is sufficient if it is for any other cause of action on contract existing at the commencement of the action.[300] This subdivision is substantially the same as the set-off permitted by the Revised Statutes. It applies where the counterclaim arises from a contract different from the contract sued on. It is independent of the previous subdivision, so that if a counterclaim arising on a contract, express or implied, fulfills the condition of the introductory clause of the section, it is admissible though it has no connection with plaintiff's cause of action or the subject of his action.[301] Thus, defendants sued for the price of goods sold, may set up a breach of a previous contract for the sale of other goods[302] or a breach of warranty in a previous sale by plaintiff to them.[303] It is not essential that the contract upon which the counterclaim is founded should be an express one,[304] nor that it have been originally made with the defendant. An action on a judgment[305] or undertaking[306] is an action on contract within this subdivision, as is an action for money lost in betting[307] or an action for a partnership ac-

[298] Carpenter v. Manhattan Life Ins. Co., 93 N. Y. 552.

[299] Kay v. Whittaker, 44 N. Y. 565, 576; Lansing v. Hadsall, 26 Hun, 619; Rafferty v. Williams, 34 Hun, 544.

[300] Code Civ. Proc. § 501, subd. 2.

[301] Parsons v. Sutton, 66 N. Y. 92.

[302] Parsons v. Sutton, 66 N. Y. 92.

[303] Brooklyn Sugar Refining Co. v. Earle, 1 Month. Law Bul. 46.

[304] Andrews v. Artisans' Bank, 26 N. Y. 298.

[305] Taylor v. Root, 4 Keyes, 335.

[306] Bien v. Freund, 26 App. Div. 202; Wickham v. Weil, 43 State Rep. 155; Delaney v. Miller, 78 Hun, 18; Bamberger v. Oshinsky, 21 Misc. 716.

[307] McDougall v. Walling, 48 Barb. 364.

counting;[308] but a suit to enjoin interference with the trade and business of plaintiff, in violation of an agreement, is not an action on a contract.[309] A foreclosure suit is, as against the mortgagor, and all persons who have assumed or become liable for the payment of the amount secured by the mortgage, an action arising on contract; but it cannot be so considered in reference to those parties who have made no agreement in relation to the mortgage or the sum secured by it, and who are made parties only because they have claims upon the land mortgaged, which the plaintiff desires to foreclose.[310]

Difficulty in applying this rule occurs where the cause of action is based on an act which the party might at common law have waived and sued for his damages in assumpsit. In such a case the weight of authority, as viewed by Mr. Throop,[311] is said to establish the following rules: First. That in an action on contract the counterclaim is good if the party interposing it might have brought an action on it, either in tort or assumpsit, and that he may sustain it as a counterclaim, even on the statement of the facts identical with the statement which would be required to render his complaint good in an action to recover damages for the tort.[312] Second. But where the plaintiff sues on a transaction of the same nature, and his complaint indicates that he relies on its tortious character and seeks to recover his damages for the tort, the defendant cannot interpose any counterclaim whatever, unless it comes within subdivision one.[313]

§ 876. Actions by assignees.

The allowance of a counterclaim in an action by an assignee of a cause of action is specifically regulated by the Code, which provides as follows:

[308] Petrakion v. Arbelly, 23 Civ. Proc. R. (Browne) 183.

[309] Sugden v. Magnolia Metal Co., 58 App. Div. 236.

[310] Agate v. King, 17 Abb. Pr. 159.

[311] See Throop's note on "Counterclaim," 3 Civ. Proc. R. (Browne) 212, 222.

[312] Andrews v. Artisans' Bank, 26 N. Y. 298; Wood v. City of New York, 73 N. Y. 556.

[313] Fishkill Sav. Inst. v. National Bank of Fishkill, 80 N. Y. 162; People v. Dennison, 84 N. Y. 272.

1. If the action is founded upon a contract, which has been assigned by the party thereto, other than a negotiable promissory note or bill of exchange, a demand existing against the party thereto, or an assignee of the contract, at the time of the assignment thereof, and belonging to the defendant, in good faith, before notice of the assignment, must be allowed as a counterclaim, to the amount of the plaintiff's demand, if it might have been so allowed against the party, or the assignee, while the contract belonged to him.
2. If the action is upon a negotiable promissory note or bill of exchange, assigned to plaintiff after it became due, a demand, existing against a person who assigned or transferred it, after it became due, must be allowed as a counterclaim, to the amount of the plaintiff's demand, if it might have been so allowed against the assignor, while the note or bill belonged to him.[314]

The gist of this Code rule is that the subject of the counterclaim must have been acquired by defendant before notice of the assignment.[315] The second subdivision relates to actions on notes and bills of exchange assigned "after maturity."[316]

§ 877. Actions by trustee or nominal plaintiff.

If the plaintiff is a trustee for another, or if the action is in the name of a plaintiff, who has no actual interest in the contract upon which it is founded, a demand against the plaintiff shall not be allowed as a counterclaim; but so much of a demand existing against the person whom he represents, or for whose benefit the action is brought, as will satisfy the plaintiff's demand, must be allowed as a counterclaim, if it might have been so allowed in an action brought by the person beneficially interested.[317]

[314] Code Civ. Proc. § 502; Raymond v. Hogan, 10 App. Div. 189.

[315] Bien v. Freund, 26 App. Div. 202; Horowitz v. Brodowsky, 24 Misc. 731; Lucas v. East Stroudsburg Glass Co., 38 Hun, 581; Lowell v. Lane, 33 Barb. 292; Foley v. Scharmann, 29 Misc. 521.

[316] Binghamton Trust Co. v. Clark, 32 App. Div. 151.

[317] Code Civ. Proc. § 502, subd. 3; United States Trust Co. v. Stanton, 139 N. Y. 531.

§ 878. Actions by executor or administrator.

In an action by an executor or administrator, in his representative capacity, a demand against the decedent, belonging, at the time of his death, to the defendant, may be set forth by the defendant as a counterclaim, as if the action had been brought by the decedent in his lifetime.[318] But a counterclaim against plaintiffs as individuals cannot be interposed.[318a] If the action is brought by the executor or administrator as individuals, a debt existing against the deceased cannot be made the subject of a counterclaim.[319] Whether this Code rule requires that the demand against the decedent be one which matured during the lifetime of the decedent, has been doubted,[320] but it would seem that the query should be answered in the affirmative.[321]

§ 879. Actions against persons acting in representative capacity.

In an action against an executor or an administrator, or other person sued in a representative capacity, the defendant may set forth, as a counterclaim, a demand belonging to the decedent, or other person whom he represents, where the person so represented would have been entitled to set forth the same, in an action against him.[322] But an executor sued in his representative capacity cannot set up as a counterclaim a judgment against plaintiff assigned to defendant, since in such a case defendant takes the judgment as an individual.[323] And a trustee cannot set off his personal claim against the beneficiary, when sued as trustee.[324]

§ 880. Mode of pleading counterclaim.

In pleading a counterclaim, the better practice is to intro-

318 Code Civ. Proc. § 506.

318a Wakeman v. Everett, 41 Hun, 278; Starke v. Myers, 24 Misc. 577.

319 Foley v. Scharmann, 58 App. Div. 250; Thompson v. Whitmarsh, 100 N. Y. 35; Gross v. Gross, 26 Misc. 385; Merritt v. Seaman, 6 N. Y. (2 Seld.) 168.

320 Jordan v. National Shoe & Leather Bank, 74 N. Y. 467.

321 McCormick v. Sullivan, 71 Hun, 333, 337.

322 Code Civ. Proc. § 505.

323 Weeks v. O'Brien, 25 App. Div. 206.

324 Harris v. Elliott, 24 App. Div. 133.

duce the statement of facts by a clause, such as "and further answering, and for a separate and distinct counterclaim to this action," etc., and by concluding the statement of facts with a prayer for a judgment granting the desired relief, as in the complaint.[325] There can be no recovery by way of counterclaim where there is no demand for affirmative relief in the answer.[326] The importance of denominating the counterclaim as such lies in the fact that the plaintiff must reply to a counterclaim while he need not reply to mere matters of defense, and that new matter set up in an answer will not warrant a judgment for failure to reply unless it is designated as a counterclaim.[327] It has been held sufficient, however, if the facts stated and relief sought clearly show that the matter was intended to be set up as a counterclaim, though it is not designated as such.[328] On the other hand, if it is uncertain whether it is intended for a counterclaim, and the defendant in his answer defines it as a defense, he is bound by his definition and cannot change the nature of the pleading which he has so characterized, as the plaintiff may have been misled thereby.[329]

The counterclaim should be stated separately from matters in defense,[330] but may consist of the same matter pleaded as a defense.[331] More than one counterclaim may be interposed but if a counterclaim refers to only one of the causes of action

325 Scott v. Montells, 109 N. Y. 1; Bates v. Rosekrans, 37 N. Y. 409.

326 Code Civ. Proc. § 509; Corning v. Roosevelt, 25 Abb. N. C. 220, 18 Civ. Proc. R. (Browne) 399, 33 State Rep. 154; Montanye v. Montgomery, 47 State Rep. 114, 19 N. Y. Supp. 655.

327 Equitable Life Assur. Soc. v. Cuyler, 75 N. Y. 511; Cockerill v. Loonam, 36 Hun, 353, note; Hatzel v. Hoffman House, 2 App. Div. 120, 73 State Rep. 295; Lafond v. Lassere, 26 Misc. 77.

328 McCrea v. Hopper, 35 App. Div. 572; Metropolitan Trust Co. v. Tonawanda Valley & C. R. Co., 18 Abb. N. C. 368, 43 Hun, 521, 7 State Rep. 90; Acer v. Hotchkiss, 97 N. Y. 395; Ward v. Craig, 87 N. Y. 550.

329 Equitable Life Assur. Soc. v. Cuyler, 75 N. Y. 511; Simmons v. Kayser, 43 Super. Ct. (11 J. & S.) 131; Ward v. Comegys, 2 How. Pr., N. S., 428; First Nat. Bank of Saratoga Springs v. Slattery, 4 App. Div. 421, 74 State Rep. 791, 38 N. Y. Supp. 859.

330 Code Civ. Proc. § 507; Foley v. Mercantile Nat. Bank, 67 State Rep. 246, 24 Civ. Proc. R. (Scott) 249, 33 N. Y. Supp. 414.

331 Garfield Nat. Bank v. Kirchwey, 17 Misc. 310.

set forth in the complaint, it must distinctly refer to the cause of action which it is intended to answer.[332]

The sufficiency of a counterclaim must be judged by the same rules as those determining the sufficiency of a complaint.[333] It must state facts constituting a cause of action[334] in explicit terms,[335] inasmuch as it may be demurred to "on the ground that it is insufficient in law on the face thereof."[336] If defendant frames the counterclaim interposed, upon the theory of tort, he will be held to the form he has adopted upon demurrer.[337] If there is more than one counterclaim, in determining their sufficiency, each must be isolated from other parts of the answer, unless they are incorporated by suitable reference,[338] as by referring to papers annexed, or to other parts of the answer, or to the complaint.[339] An answer setting up a counterclaim is not insufficient because it does not present a defense to the whole demand of plaintiff. It is not required that a counterclaim equal the amount of the plaintiff's claim.[340] If defendant interposes in a counterclaim denials which are not a necessary part of it, he cannot thereby save the counterclaim from a demurrer, and the denials thereupon become admissions against him.[341]

The facts to show that the counterclaim is a proper one, such as that the counterclaim was due when the action was brought,[342] and that it was owned by defendant at said time,[343] and that the alleged counterclaim arose out of the transaction

332 Code Civ. Proc. § 507.

333 Merritt v. Millard, 18 Super. Ct. (5 Bosw.) 645.

334 Merritt v. Millard, 18 Super. Ct. (5 Bosw.) 645.

335 Rice v. Grange, 131 N. Y. 149.

336 Code Civ. Proc. § 494.

337 De Forest v. Andrews, 27 Misc. 145, 29 Civ. Proc. R. (Kerr) 250.

338 Roldan v. Power, 14 Misc. 480, 70 State Rep. 432.

339 Cragin v. Lovell, 88 N. Y. 258.

340 Allen v. Haskins, 12 Super. Ct. (5 Duer) 332; Ross v. Longmuir, 15 Abb. Pr. 326, 24 How. Pr. 49.

341 Wintringham v. Whitney, 1 App. Div. 219, 72 State Rep. 660.

342 John Church Co. v. Clarke, 77 Hun, 467; Rice v. O'Connor, 10 Abb. Pr. 362; Chambers v. Lewis, 11 Abb. Pr. 210; Mayo v. Davidge, 44 Hun, 342. Contra,—Blaut v. Borchardt, 12 Misc. 197.

343 Van Valen v. Lapham, 12 Super. Ct. (5 Duer) 689.

set forth in the complaint,[344] must all be pleaded. If the counterclaim is interposed in an action by an assignee, the answer must allege that such set-off belonged to defendant before he had notice of the assignment to the plaintiff of the claim sued upon.[345]

§ 881. Effect of failure to set up counterclaim.

The general rule is, as will be more fully stated in a subsequent chapter relating to judgments, that the failure to set up a counterclaim in an answer does not preclude defendant from thereafter bringing an independent action thereon against plaintiff.[346]

[344] Brown v. Buckingham, 11 Abb. Pr. 387, 21 How. Pr. 190.

[345] Venable v. Harlin, 1 Civ. Proc. R. (McCarty) 215.

[346] Brown v. Gallaudet, 80 N. Y. 413; Inslee v. Hampton, 8 Hun, 230; Davis v. Aikin, 85 Hun, 554.

CHAPTER IV.

THE REPLY.

§ 882. Time for reply.

Within twenty days from the time of service of an answer on plaintiff, if the answer contains a counterclaim, plaintiff must file a reply. But leave to file a reply has been granted after the commencement of the trial[1] and even after judgment.[2] But it is in "furtherance of justice" to allow a party who has omitted to plead the statute of limitations in bar to a counterclaim, to serve a reply as an amended pleading, after judgment, in order to avail himself of the statute.[3]

§ 883. Necessity for reply.

A counterclaim set up in the answer must be replied to,[4] but an answer containing new matter and constituting a defense by way of avoidance, need not be replied to except where the

[1] Pardee v. Foote, 9 Abb. Pr., N. S., 77; Willis v. Underhill, 6 How. Pr. 396.

[2] Smith v. Floyd, 18 Barb. 522.

[3] Clinton v. Eddy, 54 Barb. 54, 37 How. Pr. 23.

[4] Code Civ. Proc. § 514.

A mere off-set should be distinguished from a counterclaim. McElwee Mfg. Co. v. Trowbridge, 68 Hun, 28, 52 State Rep. 64; Romano v. Irsch, 7 Misc. 147, 57 State Rep. 493; American Dock & Imp. Co. v. Staley, 40 Super. Ct. (8 J. & S.) 539; Thompson v. Sickles, 46 Barb. 49.

court, in the exercise of its discretion, so requires.[5] And where facts are set forth in the answer so as to constitute a distinct cause of action, but are not expressly averred as a counterclaim, no reply is necessary.[6] A prayer for affirmative relief is not of itself sufficient for this purpose.[7] A defense consisting of new matter, not constituting a counterclaim, is deemed controverted; and plaintiff, without pleading, may traverse, or avoid it, and is entitled to the benefit of every possible answer to it, the same as if pleaded.[8]

The objection that the counterclaim is barred by limitations[9] can be taken only by reply.

§ 884. Order of court requiring reply.

Where an answer contains new matter, constituting a defense by way of avoidance, the court may, in its discretion, on the defendant's application, direct the plaintiff to reply to the new matter.[10] It will be noticed that the application must be made by "defendant" and the granting thereof is "discretionary."[11] This discretionary power will not be exercised in every case,[12] but ordinarily only to prevent surprise and promote the

[5] Code Civ. Proc. § 516; Walker v. American Cent. Ins. Co., 143 N. Y. 167; Farrell v. Amberg, 8 Misc. 220, 59 State Rep. 449, 23 Civ. Proc. R. (Browne) 434; Havana City Ry. Co. v. Ceballos, 49 App. Div. 421; Deering v. City of New York, 51 App. Div. 402; Steinway v. Steinway, 68 Hun, 430, 52 State Rep. 660; Hartford Nat. Bank v. Beinecke, 15 App. Div. 474, 78 State Rep. 486, 4 Ann. Cas. 219, 26 Civ. Proc. R. (Scott) 226; Dambman v. Schulting, 6 Thomp. & C. 251, 4 Hun, 50.

[6] Morris v. Chamberlin, 38 State Rep. 476; Bates v. Rosekrans, 23 How. Pr. 98.

[7] Wood v. Gordon, 38 State Rep. 455, 13 N. Y. Supp. 595.

[8] Arthur v. Homestead Fire Ins. Co., 78 N. Y. 462; Bowe v. Wilkins, 105 N. Y. 322; Chambovet v. Cagney, 35 Super. Ct. (3 J. & S.) 474; Keeler v. Keeler, 102 N. Y. 30; O'Meara v. Brooklyn City R. Co., 16 App. Div. 204; Garner v. Manhattan Bldg. Ass'n, 13 Super. Ct. (6 Duer) 539; Groot v. Agens, 107 N. Y. 633; Johnson v. White, 6 Hun, 587.

[9] Code Civ. Proc. § 413; Williams v. Willis, 15 Abb. Pr., N. S., 11.

[10] Code Civ. Proc. § 516.

[11] Cauchois v. Proctor, 79 Hun, 388, 61 State Rep. 508.

[12] Scofield v. Demorest, 55 Hun, 254, 27 State Rep. 898; Zeiner v. Mutual Reserve Fund Life Ass'n, 51 App. Div. 607, 64 N. Y. Supp. 63;

interest of justice,[13] though the necessity to prevent surprise is not the only test.[14] A reply to new matter will not be directed when the only purpose sought in having such reply served is to relieve the defendant from the necessity of proving the facts which he set up in his answer as a defense by way of avoidance,[15] nor where the answer consists of evidentiary facts not tendering an issue or the allegation of a conclusion of fact.[16] And plaintiff cannot be compelled to reply to allegations of new matter in the answer setting forth the details of legal proceedings had in another state.[17]

But where, in an action against the survivor of an alleged general partnership, the answer merely denied that defendant was a general partner, and alleged that he was a special partner and that all the requirements of the statutes as to limited partnerships had been complied with, it was proper to require plaintiff to serve a reply, so as to raise a definite issue as to what violation of the statute was relied upon.[18] So, where a judgment is pleaded in avoidance which on its face would lead to a judgment for defendant, a reply should be ordered, because it should be made known how plaintiff intended to meet the issue of facts so tendered.[19] And where in an action for dower, defendant alleged that the deceased had been divorced, defendant's motion to compel a reply was granted.[20]

A reply has been ordered to a plea of the statute of limita-

Columbus, H. V. & T. R. Co. v. Ellis, 25 Abb. N. C. 150, 19 Civ. Proc. R. (Browne) 66.

[13] Toplitz v. Garrigues, 71 App. Div. 37; Schwan v. Mutual Trust Fund Life Ass'n, 9 Civ. Proc. R. (Browne) 82.

[14] Cavanagh v. Oceanic Steamship Co., 30 State Rep. 532.

[15] Masters v. De Zavala, 48 App. Div. 269; Mercantile Nat. Bank v. Corn Exch. Bank, 73 Hun, 78; Perls v. Metropolitan Life Ins. Co., 29 State Rep. 409, 15 Daly, 517.

[16] Steinway v. Steinway, 68 Hun, 430, 52 State Rep. 660.

[17] Winchester v. Browne, 25 Abb. N. C. 148, 19 Civ. Proc. R. (Browne) 68; New York, L. E. & W. R. Co. v. Robinson, 25 Abb. N. C. 116, 11 State Rep. 890, 12 N. Y. Supp. 208.

[18] Williams v. Kilpatrick, 21 Abb. N. C. 61.

[19] Mercantile Nat. Bank v. Corn Exch. Bank, 73 Hun, 78, 57 State Rep. 134, 25 N. Y. Supp. 1068.

[20] Brinkerhoff v. Brinkerhoff, 8 Abb. N. C. 207.

tions,[21] but was refused where all the facts on which plaintiff relied to defeat the plea of the statute appeared by affirmative allegations.[22]

The application should be made before the cause is noticed for trial. The affidavit should be made by defendant and state that he is advised by his attorney that it is necessary for the proper defense of the action and to prevent surprise at the trial, that the defendant and his attorney be informed before the trial in what way the plaintiff expects to defeat the defense.[23]

§ 885. Right to reply.

Plaintiff has no right to reply where a reply is not necessary, unless directed by the court on defendants' application. It cannot be ordered on plaintiff's application.[24] An unnecessary reply served without an order requiring it, is irrelevant and will be stricken out.[25]

§ 886. Contents and sufficiency.

The reply must contain a general or specific denial of each material allegation of the counterclaim or defense, controverted by the plaintiff, or of any knowledge or information thereof sufficient to form a belief; and it may set forth in ordinary and concise language, without repetition, new matter not inconsistent with the complaint, constituting a defense to the counterclaim or defense.[26] The reply must be distinct and specific, so that the defendant and the court may clearly see what is controverted.[27] A mere denial is a sufficient compliance

[21] Cavanagh v. Oceanic Steamship Co., 30 State Rep. 532; Hubbell v. Fowler, 1 Abb. Pr., N. S., 1.

Refused in New York, L. E. & W. R. Co. v. Robinson, 25 Abb. N. C. 116.

[22] Avery v. New York Cent. & H. R. R. Co., 24 State Rep. 918.

[23] See Hubbell v. Fowler, 1 Abb. Pr., N. S., 1.

[24] McDonald v. Davis, 1 Month. Law Bul. 20.

[25] Sterling v. Metropolitan Life Ins. Co., 6 State Rep. 96; Dillon v. Sixth Ave. R. Co., 46 Super. Ct. (14 J. & S.) 21; Gilbert v. Cram, 12 How. Pr. 455; Ward v. Comegys, 2 How. Pr., N. S., 428.

[26] Code Civ. Proc. § 514; Walbourn v. Hingston, 86 Hun, 63, 66 State Rep. 814; Williams v. Williams, 14 Misc. 79, 69 State Rep. 580; Croome v. Craig, 53 Hun, 350, 25 State Rep. 532.

[27] Risley v. Carll, 1 Month. Law Bul. 52.

with an order requiring plaintiff to reply to new matter, but it will only avail at the trial to enable plaintiff to controvert the new matter, and not to prove an avoidance thereof.[28] The rules hitherto set forth in regard to the sufficiency of denials in an answer would seem to apply to denials in a reply, and hence the rules will not be reiterated except to state that a denial of a counterclaim in the words "alleges that he denies, all and singular, the allegations in said answer which set up a counterclaim," while not commendable, has been held sufficient.[29] While the reply may set up two or more distinct defenses,[30] yet such defenses must be separately set up and numbered.[31] And a reply which denies the allegations of the counterclaim does not, by setting up new matter in avoidance of it, admit those allegations.[32]

——**Departure.** The common law rule forbidding a departure in a reply still exists under the Code provision that the new matter set forth therein must not be inconsistent with the complaint.[33] Hence a new cause of action against defendant cannot be set up in a reply,[34] nor can it remedy defects in the complaint, or enlarge the prayer for relief, or set up a modification of the contract set forth in the complaint.[35]

§ 887. Effect of reply.

By replying to a counterclaim, though it is not properly connected with the subject-matter of the action, the plaintiff raises a material issue.[36]

28 Winchester v. Browne, 26 Abb. N. C. 387.

29 Pray v. Todd, 71 App. Div. 391; Perry v. Levenson, 82 App. Div. 94.

30 Code Civ. Proc. § 517.

31 Code Civ. Proc. § 517.

32 Del Valle v. Navarro, 21 Abb. N. C. 136.

33 Code Civ. Proc. § 514; Mutual Life Ins. Co. v. Robinson, 24 App. Div. 570.

34 Fitzgerald v. Rightmeyer, 12 Misc. 186, 67 State Rep. 249.

Counterclaim cannot be set up in a reply. Hatfield v. Todd, 13 Civ. Proc. R. (Browne) 265; Windecker v. Mutual Life Ins. Co., 12 App. Div. 73; Cohn v. Husson, 66 How. Pr. 150.

35 Eidlitz v. Rothschild, 87 Hun, 243, 67 State Rep. 733.

36 Thomas v. Loaners' Bank, 38 Super. Ct. (6 J. & S.) 466; Myers v. Rosenback, 13 Misc. 145, 68 State Rep. 18.

§ 888. Effect of failure to reply.

If the plaintiff fails to reply or demur to the counterclaim, the defendant may apply, upon notice, for judgment thereupon; and, if the case requires it, a reference may be ordered, or a writ of inquiry may be issued, as where the plaintiff applies for judgment.[37] The same rule applies where the court has ordered a reply to an answer containing new matter constituting a defense, and plaintiff fails to reply or demur.[38] But a defendant is not permitted, even though he has concealed a counterclaim in his answer, to stand by and allow the plaintiff to proceed as though no counterclaim were pleaded, and so attempt to take advantage of the omission to file a reply at the close of the plaintiff's case upon an application to dismiss the complaint.[39] Nor does failure to serve a reply afford ground for striking the cause from the calendar on defendant's motion.[40] Furthermore, by omitting to reply plaintiff does not waive his objection that the matter alleged in the answer does not give a right to a counterclaim, since that is matter of law.[41] And failure to reply to a counterclaim for unliquidated damages does not entitle the defendant to the direction of a verdict without proof of damages.[42] So, if a reply is not served within twenty days but before trial plaintiff discovers that the counterclaim should have been replied to, the special term has power to grant leave.[43]

Form of reply.

Plaintiff in the above entitled action, in reply to the counterclaim contained in defendant's answer herein, denies each and every allegation in said counterclaim contained and demands judgment as in his complaint prayed for.

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[37] Code Civ. Proc. § 515; McCrea v. Hopper, 35 App. Div. 572.

[38] Code Civ. Proc. § 516.

[39] Bear v. American Rapid Telegraph Co., 66 How. Pr. 274.

[40] Gilbert v. McKenna, 15 Misc. 25, 71 State Rep. 480, 25 Civ. Proc. R. (Scott) 143.

[41] Stevens v. Orton, 18 Misc. 538, 77 State Rep. 792; Jordan v. National Shoe & Leather Bank, 74 N. Y. 467.

See, also, Campbell v. Genet, 2 Hilt. 290.

[42] Scribner v. Levy, 23 State Rep. 354, 1 Silv. Sup. Ct. 143; Barber v. Gray, 4 Misc. 193, 53 State Rep. 486; McKensie v. Farrell, 17 Super. Ct. (4 Bosw.) 192; Merritt v. Millard, 18 Super. Ct. (5 Bosw.) 645.

[43] Strauss v. Edelstein, 48 App. Div. 552

CHAPTER V.

DEMURRERS.

§ 889. Definition, nature and kinds.

A demurrer is an objection that the pleading against which

it is directed is insufficient in law to support the action or defense, and that the demurrant should not, therefore, be required to further plead.[1] It is a "pleading," as the term is used in the Code,[2] and raises questions of law as distinguished from questions of fact which must be raised by answer. If there be any question as to whether a pleading is a demurrer or an answer, the test is whether it requires the proving of any facts.[3] Defendant cannot both demur to, and answer, at the same time, a single cause of action alleged in the complaint;[4] though he may demur to one cause of action stated in the complaint and answer the others.[5] But if a person is sued in a double capacity, such as executor and trustee, he may answer as executor and demur as trustee, where no cause of action is set forth against him in the latter capacity.[6] And one defendant may demur while the other answers on the merits.[7]

The ground of demurrer must appear on the face of the pleading,[8] i. e., no evidence will be heard as to the facts. For instance, where the complaint in an action by a plaintiff designated as a national bank does not aver that plaintiff is a corporation it cannot be assumed in aid of a demurrer that the action is brought by a corporation, but the objection must be taken by answer.[9]

Part of a pleading cannot be demurred to. A demurrer will lie only to the whole of a cause of action or defense and not to

[1] 6 Enc. Pl. & Pr. 296.

[2] Cashman v. Reynolds, 123 N. Y. 138, 141. See Code Civ. Proc. § 487, which provides that "the only pleading on the part of a defendant is either a demurrer or an answer."

[3] Struver v. Ocean Ins. Co., 16 How. Pr. 422.

[4] Slocum v. Wheeler, 4 How. Pr. 373, 3 Code R. 59; Munn v. Barnum, 1 Abb. Pr. 281, 12 How. Pr. 563; Morey v. Ford, 32 Hun, 446.

[5] Code Civ. Proc. § 492; Clarkson v. Mitchell, 3 E. D. Smith, 269.

[6] Kaughran v. Kaughran, 73 App. Div. 150.

[7] Allison Bros. Co. v. Hart, 56 Hun, 282, 30 State Rep. 697.

[8] Mitchell v. Thorne, 134 N. Y. 536; Wallace v. Berdell, 24 Hun, 379; Irving Nat. Bank v. Corbett, 10 Abb. N. C. 85.

But the objection may appear by reference to other pleadings or parts of the same pleading. Cragin v. Lovell, 88 N. Y. 258.

[9] Irving Nat. Bank v. Corbett, 10 Abb. N. C. 85.

a separate paragraph thereof.[10] If the matter contained in a separate paragraph is deemed to constitute, of itself, a cause of action or defense, the procedure is to first move to compel the pleader to state and number it separately and then demur.[11]

At common law, demurrers were classed as general and special demurrers. The one reached only matters of substance, while the other pointed out specifically the objection relied on and was necessary where the defect was merely formal. Under the Codes, defects merely formal which, under the common law system, were properly subjects of a special demurrer, are not the subject of a demurrer.[12] At present the only grounds for a demurrer are those expressly mentioned in the Code.[13]

§ 890. Time to demur.

A demurrer must be served, if at all, within twenty days from the time of service of summons and complaint, except where time has been extended.[14] And notice of trial by both parties does not preclude a demurrer to the answer being served within the time prescribed by law.[15]

§ 891. Pleadings subject to demurrer.

A demurrer lies, in a proper case, to the complaint, the answer, or the reply. But the summons or the caption of the complaint cannot be demurred to.[16] An amended pleading is also subject to a demurrer. A supplemental pleading cannot be demurred to, where it is not intended to set up a separate

[10] Hollingsworth v. Spectator Co., 53 App. Div. 291; New Jersey Steel & Iron Co. v. Robinson, 60 App. Div. 69; Kager v. Brenneman, 33 App. Div. 452.

[11] New Jersey Steel & Iron Co. v. Robinson, 60 App. Div. 69.

[12] De Witt v. Swift, 3 How. Pr. 280, 1 Code R. 25, 6 N. Y. Leg. Obs. 314; Richards v. Edick, 17 Barb. 260; Graham v. Camman, 12 Super. Ct. (5 Duer) 697, 13 How. Pr. 360; Johnson v. Golder, 132 N. Y. 116.

[13] Marie v. Garrison, 83 N. Y. 14; Singer v. Effler, 16 Misc. 334; Bottom v. Chamberlain, 21 Misc. 556; Harper v. Chamberlain, 11 Abb. Pr. 234.

[14] As to computation of time where service is substituted or by publication, see ante, § 659.

[15] Brassington v. Rohrs, 3 Misc. 258.

[16] Soldiers' Home of St. Louis v. Sage, 11 Misc. 159, 67 State Rep 293, 1 Ann. Cas. 106.

cause of action, but merely additional facts to those alleged in the original pleading;[17] but if a supplemental complaint is served in lieu of the original pleading, it may be demurred to.[18]

§ 892. Grounds of demurrer to complaint

The only grounds of demurrer to the complaint are the eight grounds enumerated in section 488 of the Code which will now be considered in the order mentioned in such Code provision. It is deemed unnecessary to repeat in connection with each Code ground that the objection must appear on the face of the complaint.

—— **(1) Want of jurisdiction of the person of the defendant.** The first ground of demurrer is that "the court has not jurisdiction of the person of the defendant."[19] The meaning of the clause "that the court has no jurisdiction of the person," as used herein, is that the person is not subject to the jurisdiction of the court and not that the suit has not been regularly commenced.[20] A demurrer on this ground is proper where the complaint in a court of limited jurisdiction, such as the county court, fails to aver that defendant is a resident of the county.[21]

—— **(2) Want of jurisdiction of subject of action.** The second ground of demurrer is that the court has not jurisdiction of the subject of the action. Want of jurisdiction in equity because of an adequate remedy at law, is not a question of jurisdiction "of the subject of the action."[22] What

[17] Hayward v. Hood, 44 Hun, 128, 8 State Rep. 457, 26 Wkly. Dig. 336; Harris v. Elliott, 29 App. Div. 568.

[18] Stearns v. Lichtenstein, 48 App. Div. 498.

[19] Getty v. Hudson River R. Co., 8 How. Pr. 177; Wilson v. City of New York, 6 Abb. Pr. 6, 15 How. Pr. 500; Gurney v. Grand Trunk Ry. Co., 37 State Rep. 557; Fisher v. Charter Oak Life Ins. Co., 52 Super. Ct. (20 J. & S.) 179; Carter v. Herbert Booth King & Bro. Pub. Co., 26 Misc. 652.

[20] Nones v. Hope Mut. Life Ins. Co., 8 Barb. 541, 5 How. Pr. 96, 3 Code R. 161; Belden v. Wilkinson, 44 App. Div. 420.

[21] Gilbert v. York, 111 N. Y. 544.

[22] Hotchkiss v. Elting, 36 Barb. 38.

is meant by jurisdiction of the subject of the action has been discussed in a previous chapter.[23]

—— **(3) Want of legal capacity to sue.** The third ground of demurrer is that plaintiff has not the legal capacity to sue. This want of capacity must, however, affirmatively appear on the face of the complaint.[24] In other words, a demurrer lies where the complaint shows that the capacity to sue does not exist and not where it merely fails to state facts showing capacity to sue.[25] Want of capacity to sue is to be distinguished from insufficiency of facts to show a cause of action;[26] the one is the right to come into court while the other is the right to relief in court.[27] For instance, the objection to the jurisdiction of a judge who appointed a receiver who is the plaintiff, should be taken by demurrer on the ground that the plaintiff has not legal capacity to sue and not on the ground that the complaint fails to state a cause of action.[28] Incapacity to sue exists when there is some legal disability, such as infancy,[29] or lunacy, or marriage of a female, or a want of title in the plaintiff to the character in which he sues, as where a person sues in a representative capacity, such as executors and administrators,[30] trustees,[31] etc.

—— **(4) Pendency of another action.** The fourth ground of demurrer to the complaint is that there is another action pending between the same parties for the same cause.[32] An action between the same parties is any proceeding in which the rights of the plaintiff in the last suit would be fully protected, whether strictly an action, an attachment, or citation before a sur-

23 See ante, §§ 128, 129.

24 Phœnix Bank v. Donnell, 40 N. Y. 410; People ex rel. Meakim v. Eckman, 63 Hun, 209, 43 State Rep. 457; Crichton v. Columbia Ins. Co., 81 App. Div. 614.

25 Barclay v. Quicksilver Min. Co., 6 Lans. 25.

26 Bank of Havana v. Magee, 20 N. Y. 355; Bank of Lowville v. Edwards, 11 How. Pr. 216.

27 Ward v. Petrie, 157 N. Y. 301, 311.

28 Hobart v. Frost, 12 Super. Ct. (5 Duer) 672.

29 Bartholomew v. Lyon, 67 Barb. 86.

30 Secor v. Pendleton, 47 Hun, 281; Robbins v. Wells, 26 How. Pr. 15.

31 Nelson v. Eaton, 7 Abb. Pr. 305.

32 Garvey v. New York Life Ins. & Trust Co., 14 Civ. Proc. R. (Browne) 106, 14 State Rep. 909; Groshon v. Lyon, 16 Barb. 461.

rogate, or a proceeding in court founded on petition.[33] As to what constitutes the "pendency" or another action, reference should be made to previous chapters.[34]

—— **(5) Misjoinder of parties plaintiff.** The fifth ground for demurrer to a complaint is misjoinder of parties plaintiff. This ground for demurrer was not authorized by the old Code,[35] and a demurrer for misjoinder of defendants is still unauthorized,[36] except as the objection is covered by a demurrer for misjoinder of causes of action.

——**(6) Defect of parties plaintiff or defendant.** The sixth ground of demurrer to a complaint is that there is a defect of parties, plaintiff or defendant. This defect of parties must appear on the face of the complaint and hence where evidence is necessary to make the defect apparent the objection must be taken by answer.[37] And in order that a defect of parties may be ground of demurrer, the party demurring must have an interest in having the omitted persons made defendants, or be in some way prejudiced by the omission.[38] Early cases which held that a demurrer because of defect of parties could not be sustained unless the complaint showed on its face that the party not joined was living,[39] cannot now be considered good law as the rule now is that a demurrer lies unless it appears on the face of the pleading that the absent parties are not living.[40] A defect of parties for which a demurrer is allowed is the same as the nonjoinder of a necessary party in an action at law under the common law system or the omission

[33] Groshon v. Lyon. 16 Barb. 461.

[34] See ante, §§ 27-41.

[35] People ex rel. Lord v. Crooks, 53 N. Y. 648.

[36] Paxton v. Patterson, 26 Abb. N. C. 389, 35 State Rep. 479; McCrea v. Chahoon, 54 Hun, 577, 28 State Rep. 242; Bradner v. Holland, 33 Hun, 288; Adams v. Slingerland, 84 N. Y. Supp. 323.

[37] Mitchell v. Thorne, 134 N. Y. 536; National Bank of Commerce v. Bank of New York, 17 Misc. 691; Hees v. Nellis, 1 Thomp. & C. 118, 65 Barb. 440.

[38] Anderton v. Wolf, 41 Hun, 571; Newbould v. Warrin, 14 Abb. Pr. 80; Arnot v. Birch, 29 App. Div. 356; Stockwell v. Wager, 30 How. Pr. 271.

[39] Strong v. Wheaton, 38 Barb. 616; Brainard v. Jones, 11 How. Pr. 569.

[40] Sullivan v. New York & Rosendale Cement Co., 119 N. Y. 348.

of a necessary party in suit in equity.[41] The parties must be "necessary," as distinguished from "proper," parties.[42] The demurrer cannot be sustained if the court can determine the controversy without prejudice to the rights of others or by saving their rights.[43]

—— **(7) Misjoinder of causes of action.** The seventh ground of a demurrer to the complaint is that two or more causes of action have been improperly united.[44] This is a ground of demurrer notwithstanding the causes of action are united in a single count.[45] A demurrer based on this ground should be sustained notwithstanding one cause of action is good.[46] But a statement of the same claim in two different forms as separate causes of action, does not make the pleading demurrable.[47] The demurrer should be overruled if the court has jurisdiction of only one of the causes of action,[48] but the demurrer cannot be defeated because it is claimed the pleading fails to state more than one good cause of action.[49]

—— **(8) Failure to state cause of action.** The eighth and last ground of demurrer to the complaint is that it does not state facts sufficient to constitute a cause of action. If the complaint states facts constituting a defense against the cause of action, it is demurrable on this ground,[50] and so if two or more unite in bringing a joint action and the facts stated do not show a joint cause of action in them, a demurrer lies.[51] It is no

41 Davy v. Betts, 23 How. Pr. 396; Palmer v. Davis, 28 N. Y. 242; Kolls v. De Leyer, 17 Abb. Pr. 312, 41 Barb. 208, 26 How. Pr. 468.

42 Wing v. Bull, 38 Hun, 291.

43 Wallace v. Eaton, 5 How. Pr. 99, 3 Code R. 161.

44 As to what causes of action may be joined, see ante, § 52.

45 Goldberg v. Utley, 60 N. Y. 427; Wiles v. Suydam, 64 N. Y. 173; Lamming v. Galusha, 135 N. Y. 239; Market & Fulton Nat. Bank v. Jones, 7 Misc. 207.

46 Flynn v. Bailey, 50 Barb. 73.

47 Hillman v. Hillman, 14 How. Pr. 456; Lackey v. Vanderbilt, 10 How. Pr. 155.

48 Cook v. Chase, 10 Super. Ct. (3 Duer) 643.

49 Higgins v. Crichton, 2 Civ. Proc. R. (Browne) 317, 11 Daly, 114, 2 Civ. Proc. R. (McCarty) 78, 63 How. Pr. 354.

50 Calvo v. Davies, 73 N. Y. 211; Kuehnemundt v. Haar, 46 Super. Ct. (14 J. & S.) 188.

51 Hynes v. Farmers Loan & Trust Co., 31 State Rep. 136; Dunder-

answer to the demurrer that the complaint states a cause of action against a defendant who has not demurred.[52] But in determining whether the complaint states a cause of action, all the facts alleged or that can by reasonable and fair intendment be implied from them, must be considered as pleaded;[53] and a demurrer will be overruled if a good cause of action is set forth, though not the one intended by the plaintiff.[54] Failure to aver that plaintiff is a corporation does not render the complaint demurrable for failure to state a cause of action,[55] nor does failure to aver whether defendant is a domestic or foreign corporation.[56] It is questionable whether the fact that the writing sued on appears on the face of the complaint to be oral, within the statute of frauds, is a ground of demurrer, but a comparatively recent case in the court of appeals[57] seems to incline to the theory that a demurrer lies in such a case. The objection that leave to sue has not been obtained may be raised on demurrer to the complaint for insufficiency.[58]

The doctrine has been announced in general terms that if a case for either legal or equitable relief is alleged, the complaint is not demurrable because the plaintiff has not demanded the precise relief to which he is entitled.[59] This rule, however, is not to be literally applied in all cases, inasmuch as the inquiry in determining whether a good cause of action is stated, is whether the plaintiff would be entitled to a judgment

dale v. Grymes, 16 How. Pr. 195; Mann v. Marsh, 35 Barb. 68, 21 How. Pr. 372.

[52] Berford v. New York Iron Mine, 21 State Rep. 439, 56 Super. Ct. (24 J. & S.) 236, 4 N. Y. Supp. 836.

[53] Coatsworth v. Lehigh Valley Ry. Co., 156 N. Y. 451; Sage v. Culver, 147 N. Y. 241; People v. City of New York, 28 Barb. 240, 8 Abb. Pr. 7, 17 How. Pr. 56; Moss v. Cohen, 158 N. Y. 240.

[54] Witherhead v. Allen, 4 Abb. App. Dec. 628, 3 Keyes, 562.

[55] Irving Nat. Bank v. Corbett, 10 Abb. N. C. 85.

[56] Rothchild v. Grand Trunk Ry. Co., 30 State Rep. 642, 19 Civ. Proc. R. (Browne) 53; Fraser v. Granite State Provident Ass'n, 8 Misc. 7, 58 State Rep. 803, 23 Civ. Proc. R. (Browne) 390.

[57] Crane v. Powell, 139 N. Y. 379.

[58] Freeman v. Dutcher, 15 Abb. N. C. 431.

[59] Abbey v. Wheeler, 170 N. Y. 122; Wetmore v. Porter, 92 N. Y. 76; Price v. Brown, 10 Abb. N. C. 67, 60 How. Pr. 511; Standart v. Burtis, 46 Hun, 82; Turner v. Bayles, 5 App. Div. 623, 39 N. Y. Supp. 518.

for any relief by default.[60] Accordingly, it is held that if only equitable relief is demanded, and a cause of action in equity is not set forth, a demurrer for failure to state a cause of action will be sustained though plaintiff is entitled to legal redress;[61] and the converse of this proposition is held to be true.[62] In other words, it is not ground for demurrer that the relief demanded is incorrect or excessive,[63] if plaintiff is entitled to any part of that which he asks.[64] And if the complaint demands a money judgment as well as equitable relief, the complaint is not demurrable as failing to state a cause of action if it sets forth either an equitable or legal cause of action.[65]

§ 893. Objections to complaint not ground of demurrer.

That the action is barred by the statute of limitations,[66] the staleness of the demand sued on,[67] irrelevancy,[68] redundancy,[69] indefiniteness and uncertainty,[70] clerical errors,[71] surplusage,[72]

[60] Walton v. Walton, 32 Barb. 203.

[61] Black v. Vanderbilt, 70 App. Div. 16; Jackson v. City of New York, 34 Misc. 380.

[62] Cody v. First Nat. Bank, 63 App. Div. 199; Swart v. Boughton, 35 Hun, 281.

[63] Wessels v. Carr, 16 Misc. 440, 74 State Rep. 227; McDonald v. Edwards, 20 Misc. 523; Middleton v. Ames, 37 App. Div. 510; Prouty v. Whipple, 10 Wkly. Dig. 387; Vogt Mfg. & Coach Lace Co. v. Oettinger, 88 Hun, 83; Edson v. Girvan, 29 Hun, 422; Alexander v. Katte, 63 How. Pr. 262; Fisher v. Charter Oak Life Ins. Co., 67 How. Pr. 191.

[64] Woodgate v. Fleet, 9 Abb. Pr. 222; Roeder v. Ormsby, 13 Abb. Pr. 334.

[65] Mitchell v. Thorne, 134 N. Y. 536; Wisner v. Consolidated Fruit Jar Co., 25 App. Div. 362.

[66] Hedges v. Conger, 10 State Rep. 42, 27 Wkly. Dig. 159; Sage v. Culver, 147 N. Y. 241.

[67] Zebley v. Farmers' Loan & Trust Co., 139 N. Y. 461.

[68] Fry v. Bennett, 7 Super. Ct. (5 Sandf.) 54, 9 N. Y. Leg. Obs. 330, Code R., N. S., 238.

[69] Village of Warren v. Philips, 30 Barb. 646; Roeder v. Ormsby, 13 Abb. Pr. 334, 22 How. Pr. 270; Bishop v. Edmiston, 16 Abb. Pr. 466.

[70] Johnson v. Golder, 132 N. Y. 116.

[71] Church v. Standard R. Signal Co., 30 Misc. 261; Chamberlin v. Kaylor, 2 E. D. Smith, 134.

[72] Fry v. Bennett, 7 Super. Ct. (5 Sandf.) 54, 9 N. Y. Leg. Obs. 330, Code R., N. S., 238; Villias v. Stern, 24 Misc. 380; Meyer v. Van Collem, 28 Barb. 230, 7 Abb. Pr. 222.

insertion of interrogatories in complaint,[73] failure to separately state and number causes of action,[74] or defects in verification,[75] are not grounds for demurrer. Furthermore, a complaint is not demurrable because the facts are informally alleged, nor because it lacks definiteness, or material facts are argumentatively stated.[76]

§ 894. Grounds of demurrer to answer.

A denial in an answer, standing by itself, is not subject to a demurrer.[77] And this is so though it is coupled with irrelevant matter not set up as a defense.[78] Furthermore, if a so-called defense repeats and reiterates certain denials contained in another defense, it is not demurrable since a denial cannot be demurred to and a demurrer to a part of a defense does not lie.[79] If the denial raises no issue, a motion for judgment on it as frivolous should be made.[80]

A defense consisting of new matter may be demurred to on the ground that "it is insufficient in law, on the face thereof."[81]

A counterclaim is demurrable on several grounds prescribed by the Code.

An amended answer may be demurred to,[82] but not where the trial judge allows an amendment to meet the proofs.[83]

[73] Bank of British North America v. Suydam, 6 How. Pr. 379, Code R., N. S., 325.

[74] Townsend v. Coon, 7 Civ. Proc. R. (Browne) 56; Zrskowski v. Mach, 15 Misc. 234, 71 State Rep. 471; Wetmore v. Porter, 92 N. Y. 76.

[75] State Bank of Olean v. Shaw, 5 Hun, 114; Webb v. Clark, 4 Super. Ct. (2 Sandf.) 647, 2 Code R. 16.

[76] Zabriskie v. Smith, 13 N. Y. (3 Kern.) 322; Hale v. Omaha Nat. Bank, 49 N. Y. 626; Marie v. Garrison, 83 N. Y. 14; Wetmore v. Porter, 92 N. Y. 76; Milliken v. Western Union Telegraph Co., 110 N. Y. 403; Kain v. Larkin, 141 N. Y. 144; Gray v. Fuller, 17 App. Div. 29, 78 State Rep. 883; Farmers' & Merchants' Nat. Bank of Buffalo v. Rogers, 15 Civ. Proc. R. (Browne) 250, 17 State Rep. 381; Radford v. Radford, 40 App. Div. 10.

[77] Flechter v. Jones, 64 Hun, 274, 46 State Rep. 125; Tiffany v. Norris, 28 Abb. N. C. 97, 45 State Rep. 700; Dunlap v. Stewart, 75 N. Y. Supp. 1085.

[78] Coddington v. Union Trust Co., 36 Misc. 396.

[79] Holmes v. Northern Pac. Ry. Co., 65 App. Div. 49.

[80] Galbraith v. Daily, 37 Misc. 156.

[81] Code Civ. Proc. § 494.

——**Defenses.** The only ground for a demurrer to a defense consisting of new matter is that it is "insufficient in law, on the face thereof,"[84] as where a defense pleaded as a complete defense at most amounts only to a partial one.[85] It has been held that an answer is insufficient in the sense of the Code, and so bad on demurrer, not only when it sets up a defense groundless in law, but when in the mode of stating a defense, otherwise valid, it violates the essential rules of pleading.[86] This statement, however, is undoubtedly too broad as it would permit an answer to be demurred to for indefiniteness or uncertainty. Irrelevancy is not ground of demurrer,[87] nor is indefiniteness or uncertainty,[88] or the fact that the defense was inartificially drawn,[89] or that the matter set up in the defense could be proved under general denial.[90] So stating facts constituting a defense as a counterclaim is not ground of demurrer.[91] A defense that plaintiff has an adequate remedy at law is not demurrable for insufficiency.[92] A pleading cannot be demurred to because hypothetical.[93]

Whether a defense containing denials in connection with new matter, may be demurred to, is not settled. There are several cases holding the negative,[94] but in the first depart-

82 Sands v. Calkins, 30 How. Pr. 1.

83 Therasson v. Peterson, 22 How. Pr. 98.

84 Code Civ. Proc. § 494.

85 Ivy Courts Realty Co. v. Morton, 73 App. Div. 335.

86 Fry v. Bennett, 7 Super. Ct. (5 Sandf.) 54.

87 Smith v. Greenin, 4 Super. Ct. (2 Sandf.) 702.

88 Stieglitz v. Belding, 20 Misc. 297, 79 State Rep. 670; McGrath v. Pitkin, 26 Misc. 862.

89 Rice v. O'Connor, 10 Abb. Pr. 362.

90 Staten Island Midland R. Co. v. Hinchliffe, 170 N. Y. 473: Kraus v. Agnew, 80 N. Y. Supp. 518.

91 Wait v. Ferguson, 14 Abb. Pr. 379.

92 Goldberg v. Kirschstein, 36 Misc. 249; McCann v. Hazard, 36 Misc. 7. Contra,—Olivella v. New York & H. R. Co., 31 Misc. 203.

93 Wiley v. Village of Rouse's Point, 86 Hun, 495, 67 State Rep. 519; Taylor v. Richards, 22 Super. Ct. (9 Bosw.) 679.

Dicta to the contrary, see Goodman v. Robb, 41 Hun, 605.

94 Flechter v. Jones, 64 Hun, 274; Wintringham v. Whitney, 1 App. Div. 219, which, however, limited the rule to "defenses." De Witt v. Brill, 6 Misc. 44.

ment several of the cases hold in the affirmative[95] on the ground that the denial is merely matter of surplusage.[96]

The rule that a demurrer does not lie to part of a defense precludes a demurrer to new matter in defenses which also repeat and re-allege the allegations of another defense.[97]

—— **Counterclaims.** A counterclaim "which does not demand an affirmative judgment" may be demurred to on one ground, i. e., that it is insufficient in law on the face thereof.[98]

The plaintiff may demur to a counterclaim, "upon which the defendant demands an affirmative judgment," where one or more of the following objections thereto, appear on the face of the counterclaim:

1. That the court has not jurisdiction of the subject thereof.
2. That the defendant has not legal capacity to recover upon the same.
3. That there is another action pending between the same parties, for the same cause.
4. That the counterclaim is not of the character specified in section five hundred and one of the Code.
5. That the counterclaim does not state facts sufficient to constitute a cause of action.[99]

A counterclaim is not demurrable on the ground that it is insufficient to constitute a "defense,"[100] nor on the ground that the prayer for relief is omitted,[101] or is insufficient.[102]

§ 895. Grounds of demurrer to reply.

The only ground of demurrer to the reply, or to a separate traverse to, or avoidance of, a defense or counterclaim, con-

[95] Carter v. Eighth Ward Bank, 33 Misc. 128; Cruikshank v. Press Pub. Co., 32 Misc. 152.

[96] Green v. Brown, 22 Misc. 279.

[97] Holmes v. Northern Pac. Ry. Co., 65 App. Div. 49.

[98] Code Civ. Proc. § 494.

[99] Code Civ. Proc. § 495.

Another action pending as ground, see John Douglas Co. v. Moler, 30 Abb. N. C. 293, 3 Misc. 373, 52 State Rep. 259; Ansorge v. Kaiser, 22 Abb. N. C. 305.

[100] Armour v. Leslie, 39 Super. Ct. (7 J. & S.) 353.

[101] Blaut v. Borchardt, 12 Misc. 197, 67 State Rep. 92.

[102] Richards v. Littell, 16 Misc. 339.

tained in the reply, is that it is insufficient in law, upon the face thereof.[103] Thus, a reply may be demurred to on the ground that it is a departure from the complaint,[104] but not because it is indefinite or uncertain,[105] or because a reply was not required by law nor directed by the court.[106]

§ 896. Joint and several demurrers.

Co-parties may demur separately in any case. So, if the liabilities of the defendants are not the same, they may demur separately on the ground that the complaint fails to state a cause of action.[107] But one defendant cannot demur on the ground that no cause of action is stated against a co-defendant.[108] If defendants demur jointly to the complaint for insufficiency, it must be overruled if the complaint charges a cause of action against any of them.[109] And a demurrer to jurisdiction over the subject of the action must be overruled, if the complaint states a cause of action of which the court has jurisdiction against the defendant who demurs.[110] Defendants may demur separately,[111] or jointly,[112] on the ground of improper joinder of causes of action.

§ 897. Contents of demurrer.

A demurrer must specify all the grounds relied on. All others are waived,[113] except the objections that a cause of action

103 Code Civ. Proc. § 493.

104 White v. Joy, 11 How. Pr. 36.

105 Williams v. Williams, 14 Misc. 79, 69 State Rep. 580.

106 Avery v. New York Cent. & H. R. R. Co., 24 State Rep. 918.

107 Paxton v. Patterson, 26 Abb. N. C. 389, 35 State Rep. 479.

108 Littell v. Sayre, 7 Hun, 485; McCrea v. Chahoon, 54 Hun, 577, 28 State Rep. 242, 8 N. Y. Supp. 88.

109 Mildenberg v. James, 31 Misc. 607; Peabody v. Washington County Mut. Ins. Co., 20 Barb. 339; Phillips v. Hagadon, 12 How. Pr. 17; Woodbury v. Sackrider, 2 Abb. Pr. 402; Eldridge v. Bell, 12 How. Pr. 547; Moore v. Monell, 27 Misc. 235.

110 Boston Base Ball Ass'n v. Brooklyn Base Ball Club, 37 Misc. 521.

111 Nichols v. Drew, 94 N. Y. 22; Barton v. Speis, 5 Hun, 60; Harris v. Eldridge, 5 Abb. N. C. 278.

112 Adams v. Stevens, 7 Misc. 468, 58 State Rep. 510, 23 Civ. Proc. R. (Browne) 356; Hess v. Buffalo & N. F. R. Co., 29 Barb. 391.

113 Dodge v. Colby, 108 N. Y. 445; Zebley v. Farmers' Loan & Trust

is not stated and that the court has not jurisdiction of the subject of the action.[114] For instance, a demurrer on the ground that sufficient facts are not stated does not raise the question as to the capacity of the plaintiff to sue,[115] or whether the person served with summons is the person therein designated,[116] or whether the court has jurisdiction of the subject of the action.[117]

Inconsistent grounds of demurrer may be set forth, if the points of law relied on to sustain each are not inconsistent with each other.[118]

A demurrer to the complaint must point out specifically the particular defect relied upon, but if it is based on the objection that the court has not jurisdiction of the person of the defendant, that the court has not jurisdiction of the subject of the action, that there is another action pending between the same parties for the same cause, or that the complaint does not state facts sufficient to constitute a cause of action, the objection may be set forth in the language of the Code, as just stated.[119] It would seem, however, that the precise words of the Code need not be followed. Thus, the words, "the complaint does not state a sufficient cause of action against the defendant," have been held equivalent to "does not state facts

Co., 139 N. Y. 461; Berney v. Drexel, 33 Hun, 419; Peck v. Richardson, 12 Misc. 310, 67 State Rep. 810; Malone v. Stilwell, 15 Abb. Pr. 421; Loomis v. Tifft, 16 Barb. 541.

This rule applies to an answer. Kreiss v. Seligman, 8 Barb. 439, 5 How. Pr. 425.

[114] Code Civ. Proc. § 499.

[115] Van Zandt v. Grant, 67 App. Div. 70; People ex rel. Lord v. Crooks, 53 N. Y. 648; Irving Nat. Bank v. Corbett, 10 Abb. N. C. 85; Secor v. Pendleton, 47 Hun, 281, 13 State Rep. 387; Van Zandt v. Van Zandt, 17 Civ. Proc. R. (Browne) 448, 26 State Rep. 963; Phœnix Bank. v. Donnell, 40 N. Y. 410.

The question of the capacity of plaintiff, a foreign corporation, to sue, is not raised by a demurrer for want of facts constituting a cause of action. O'Reilly, Skelly & Fogarty Co. v. Greene, 18 Misc. 423, 75 State Rep. 1416.

[116] Gannon v. Myars, 11 Civ. Proc. R. (Browne) 187, 3 State Rep. 199.

[117] Drake v. Drake, 41 Hun, 366, 11 Civ. Proc. R. (Browne) 77.

[118] Feeley v. Wurster, 25 Misc. 544.

[119] Code Civ. Proc. § 490.

sufficient to constitute a cause of action."[120] The other objections which are grounds of demurrer to the complaint cannot be set forth in the words of the statute.[121]

If it is claimed that the complaint does not state facts sufficient to constitute a cause of action as to one or more of the several plaintiffs, the demurrer must specify the plaintiff to whom objection is made.[122]

The Code provides that "the defendant may demur to the whole complaint, or to one or more separate causes of action, stated therein. In the latter case, he may answer the causes of action not demurred to."[123] In such case, the demurrer should clearly state the cause or causes of action demurred to, if less than the whole. If the demurrer is for misjoinder of causes of action it should be taken to the entire complaint.[124]

——**Demurrer to defense.** If the demurrer is to new matter set up as a defense it is sufficient to use the words of the statute, i. e., "that it is insufficient in law, on the face thereof." But it is not sufficient to state that the defense "does not state sufficient facts to constitute a defense."[125] If the answer alleges new matter arising subsequent to the action as a defense, and also denies material allegations of the complaint, the demurrer must not be general, but must specifically attack the allegation of new matter.[126] A demurrer "to each and every defense contained in the answer" is the same in effect as if the plaintiff had demurred separately to each defense,[127] but such a demurrer is too indefinite where the answer does not set up the facts as separate defenses, but denies plaintiff's right to the money in question and then alleges that defendant is entitled to the money.[128]

——**Demurrer to counterclaim.** A demurrer to a counterclaim demanding an affirmative judgment, must distinctly spec-

120 De Witt v. Swift, 3 How. Pr. 280.
121 Davis v. City of New York, 75 App. Div. 518.
122 Richtmyer v. Richtmyer, 50 Barb. 55.
123 Code Civ. Proc. § 492.
124 Hannahs v. Hammond, 28 Abb. N. C. 317.
125 McCann v. Hazard, 36 Misc. 7.
126 McBride v. American Surety Co., 70 Hun, 369, 54 State Rep. 106.
127 Kennagh v. McGolgan, 21 State Rep. 326.
128 Drake v. Satterlee, 41 State Rep. 576, 16 N. Y. Supp. 334.

ify the objections to the counterclaim; otherwise it may be disregarded. The mode of specifying the objections is the same as where a demurrer is taken to a complaint.[129] This means that the objection to the counterclaim may be in the language of the statute with the single exception of the ground "that the defendant has not the legal capacity to recover on the" counterclaim.[130] Thus, a demurrer to a counterclaim which states that the "counterclaim is not of the character specified in Code Civ. Proc., § 501," is sufficient.[131] A demurrer on the ground that the counterclaim "does not state facts sufficient to constitute a counterclaim," though not in the exact words of the statute, sufficiently raises the question whether the facts stated constitute a cause of action.[132] The general rule, previously stated, that one ground of demurrer cannot be specified and another relied on, also applies. Thus, on a demurrer for insufficiency, plaintiff cannot raise the objection that it does not disclose a cause of acton arising out of the contract set forth in the complaint; this is a distinct ground of demurrer, and must be specified.[133]

If no affirmative judgment is demanded in the counterclaim, the only ground of demurrer is that "it is insufficient in law, on the face thereof," and it is sufficient to so state in the demurrer without further specifying the objections.[134]

Forms of demurrers.

The defendant, ———. demurs to the complaint herein, and, for the grounds of his demurrer, states that it appears on the face of the complaint:

I. That the court has not jurisdiction of the person of the defendant.

II. That the court has not jurisdiction of the subject of the action.

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129 Code Civ. Proc. § 496.

130 Weeks v. O'Brien, 20 Misc. 48, which has not been overruled in so far as it holds that defect relied on must be specified where objection is that defendant has not legal capacity to sue.

131 Eckert v. Gallien, 40 App. Div. 525.

Contra,—Grange v. Gilbert, 10 Civ. Proc. R. (Browne) 98; Weeks v. O'Brien, 20 Misc. 48.

132 Kissam v. Bremerman, 44 App. Div. 588.

133 Safford v. Snedeker, 67 How. Pr. 264.

134 Otis v. Shants, 128 N. Y. 45.

III. That the plaintiff has not legal capacity to sue in this, to-wit: that the complaint shows on its face that the promissory note mentioned therein was made payable to ———, and said complaint does not show the possession or title of said note to be in either or both of above named plaintiffs or that they have any right in connection thereto.[135]

IV. That there is another action pending between the same parties for the same cause.

V. That there is a misjoinder of parties plaintiff in that the plaintiff, ———, is improperly joined with the other plaintiffs because ———.

VI. That there is a defect of parties plaintiff (or defendant) in that the ——— has not made ———, who are proper and necessary parties to the cause of action alleged in said complaint, parties ——— herein.[136]

VII. That two or more causes of action have been improperly united, because [an action to recover real property, usually called an action in ejectment, is united with an action to determine a claim to real property, usually called an action to quiet title, and also with an action upon contract to recover a sum of money for rent].[137]

VIII. That the complaint does not state facts sufficient to constitute a cause of action.

—— Form of demurrer to defense consisting of new matter.

Plaintiff demurs to the answer herein on the ground that it is insufficient in law on the face thereof.

—— Form of demurrer to counterclaim not demanding an affirmative judgment.

The plaintiff demurs to the ——— separate defenses contained in defendant's answer herein, and to each of them, on the ground that the same was, and each of them is, insufficient in law on the face thereof, and that the facts stated therein do not constitute a defense or a counterclaim herein.[138]

—— Form of demurrer to counterclaim when defendant demands an affirmative judgment.

The plaintiff demurs to so much of the answer herein constituting

[135] For another form, see 18 Civ. Proc. R. (Browne) 153.

[136] This form is from First Nat. Bank of Brooklyn v. Wright, 38 App. Div. 2.

[137] This form is from Bulger v. Coyne, 20 App. Div. 224.

Demurrer stating that "causes of action on a contract are joined with a cause of action in tort" is good. McClure v. Wilson, 13 App. Div. 274.

[138] This form of demurrer was held sufficiently specific in Otis v. Shants, 128 N. Y. 45.

a counterclaim for the following reasons which appear on the face of the counterclaim:

I. That the court has not jurisdiction of the subject thereof.

II. That defendant has not legal capacity to recover on the same in that [specify the particular defect].

III. That there is another action pending between the same parties for the same cause of action therein set forth.

IV. That the counterclaim is not of a character specified in section 501 of the Code of Civil Procedure.[139]

V. That the counterclaim does not state facts sufficient to constitute a cause of action.

——Form of demurrer to a reply.

The defendant demurs to the reply herein on the ground that it is insufficient in law on the face thereof.

§ 898. Hearing on demurrer.

The hearing on a demurrer, at special term, is confined to issues of law arising from the pleadings.[140] It must be disposed of before any issue of fact can be tried,[141] except where the court otherwise directs.[142] Except in the first and second judicial districts, the issue may be brought on and tried at any term of court as a contested motion.[143] The service of an answer waives the right to have a hearing or judgment on a demurrer previously served.[144]

In arriving at a determination as to whether the demurrer shall be sustained or overruled, the copy of the pleading served on the demurrant rather than the original, is to be considered.[145] The court may also consider the nature of the relief

[139] If it is desired, plaintiff may use such phrases as "in that a counterclaim to recover money alleged to be due under a contract cannot be allowed in an action for conversion;" or "in that a counterclaim to recover for an alleged conspiracy and confederation to deprive the defendant of the benefit of an exclusive right to sell certain goods under a contract cannot be allowed in an action for conversion." See Ter Kuile v. Marsland, 81 Hun, 420.

[140] As to the county in which the hearing may be had, see ante, § 387.

[141] Code Civ. Proc. § 966; Wilson v. Robinson, 6 How. Pr. 110.

[142] Code Civ. Proc. § 967.

[143] Code Civ. Proc. § 976.

[144] Musgrave v. Webster, 53 How. Pr. 367.

[145] Lane v. Salter, 27 Super. Ct. (4 Rob.) 239.

demanded.[146] But if the complaint is demurred to for defect of parties, the summons cannot be looked to in support of the demurrer.[147]

On demurrer to one defense, the sufficiency of other defenses should not be passed on;[148] and the defense demurred to, if one of several, cannot be aided by other defenses or denials, unless repeated or incorporated by reference in such defense.[149] But allegations of the complaint referred to in the answer are considered as incorporated therein for the purpose of a demurrer,[150] and it seems that a denial of an allegation in the complaint incorporated in the defense, may be considered.[151] If the answer sets up new matter merely, the court in considering the demurrer will treat the allegations of both the complaint and answer as true.[152] Each defense, unless otherwise designated, will be considered as intended as a complete defense and so tested.[153] On demurrer to a defense to one of the causes of action or a partial defense to the whole complaint, the only question is whether facts so pleaded are sufficient for that purpose.[154] The fact that one defendant answers has no effect on the determination of a demurrer by another.[155]

If the complaint does not show on its face when the action was commenced, the law applicable will be the law existing at the time of the trial of the issues.[156]

146 Buckley v. Harrison, 10 Misc. 683, 65 State Rep. 93, 1 Ann. Cas. 335, 31 N. Y. Supp. 999.

147 Cochran v. American Opera Co., 20 Abb. N. C. 114.

148 Metzger v. Carr, 79 Hun, 258, 61 State Rep. 14.

149 Douglass v. Phenix Ins. Co., 138 N. Y. 209; Delaney v. Miller, 84 Hun, 244, 65 State Rep. 834, 1 Ann. Cas. 266; Wiley v. Village of Rouse's Point, 86 Hun, 495, 67 State Rep. 519.

150 Cragin v. Lovell, 88 N. Y. 258.

151 Colvin v. Martin, 68 App. Div. 633, 74 N. Y. Supp. 11.

152 Long v. City of New York, 81 N. Y. 425; Delaney v. Miller, 84 Hun, 244, 65 State Rep. 834, 1 Ann. Cas. 266; Janes v. Saunders, 19 App. Div. 538; Golden v. Health Dept., 21 App. Div. 420; Valentine v. Lunt, 51 Hun, 544, 22 State Rep. 847.

153 Garrett v. Wood, 57 App. Div. 242; Belden v. Wilkinson, 33 Misc. 659.

154 Coyle v. Ward, 167 N. Y. 240.

155 Webb v. Vanderbilt, 39 Super. Ct. (7 J. & S.) 4.

156 Lewis v. City of Buffalo, 29 How. Pr. 335.

A demurrer to the whole complaint should be overruled where one of the causes of action is sufficient,[157] and a general demurrer to an answer must be overruled if one defense is good.[158]

—— **Admissions by demurrer.** A demurrer to a pleading admits the facts stated therein.[159] But where the allegations of a pleading demurred to are contradictory, a demurrer only admits those allegations which the law adjudges to be true.[160] Of course, a demurrer to a part of a cause of action or defense is not an admission of facts stated in another cause of action or defense.[161] While "facts" are admitted, mere inferences are not,[162] nor are conclusions of the pleader,[163] irrespective of whether they are conclusions of fact or law,[164] except in so far as they are legitimate deductions from the facts.[165] Among the conclusions of law not admitted by demurrer may be mentioned an allegation that a judgment of another state is void in that state,[166] an allegation "that plaintiff took said note subject to the said offset or counterclaim,"[167] an allegation that certain acts of the common council were illegal official acts,[168] an allegation that plaintiffs are heirs-at-law of testa-

157 Swords v. Northern Light Oil Co., 17 Abb. N. C. 115; Henderson v. Commercial Advertiser Ass'n, 46 Hun, 504, 12 State Rep. 649; Grimshaw v. Woolfall, 40 State Rep. 299; Cummings v. American Gear & Spring Co., 87 Hun, 598, 68 State Rep. 653.

158 Ross v. Duffy, 12 State Rep. 584; McGrath v. Pitkin, 26 Misc. 862.

159 Cutler v. Wright, 22 N. Y. 472; Atkins v. Judson, 33 App. Div. 42; National Bank of Commerce v. Bank of New York, 17 Misc. 691; Evans v. Board of St. Com'rs of City of Hudson, 84 Hun, 206, 65 State Rep. 747.

160 Freeman v. Frank, 10 Abb. Pr. 370.

161 Jorgensen v. Minister, etc., of Reformed Low Dutch Church, 7 Misc. 1, 57 State Rep. 842.

162 Bewley v. Equitable Life Assur. Soc. 61 How. Pr. 344; Greeff v. Equitable Life Assur. Soc., 160 N. Y. 19; Swan v. Mutual Reserve Fund Life Ass'n, 20 App. Div. 255.

163 Kip v. New York & H. R. Co., 67 N. Y. 227; Supervisors of Saratoga v. Seabury, 11 Abb. N. C. 461; Gannon v. Fergotston, 67 State Rep. 835; Masterson v. Townshend, 123 N. Y. 458.

164 Douglas v. Phenix Ins. Co., 63 Hun, 393, 44 State Rep. 237.

165 Alamango v. Board Sup'rs of Albany County, 25 Hun, 551.

166 Kinnier v. Kinnier, 53 Barb. 454, 3 Abb. Pr., N. S., 425, 35 How. Pr. 66; Kinnier v. Kinnier, 45 N. Y. 535.

167 Binghamton Trust Co. v. Clark, 32 App. Div. 151.

168 Talcott v. City of Buffalo, 125 N. Y. 280.

trix,[169] an allegation that defendant is a domestic corporation where the question of incorporation depends on public acts of which the court is bound to take notice,[170] an allegation as to the meaning of a contract set forth in the pleading demurred to,[171] and the construction given to statutes.[172]

The admissions thus arising are not only binding on the hearing of the demurrer, but also on the trial unless the demurrer is taken from the record either by an express withdrawal or by pleading over.[173] Hence, if defendant is given leave to withdraw his demurrer to a reply, but does not do so, the facts stated in the reply which were admitted by the demurrer, remain admitted on the trial of the issue of fact.[174] So, if plaintiff fails to reply after a demurrer to defenses in an answer has been overruled, and the demurrer remains on the record, it constitutes an admission of the facts set forth in the part of the answer demurred to.[175] But by answering the defendant withdraws his demurrer and it no longer properly forms any part of the record.[176]

——**Demurrer as opening the record.** The general rule is that judgment is to be given against the first party whose pleadings are defective in substance as distinguished from form,[177] and this rule applies to a demurrer to a counter-

169 Henriques v. Yale University, 28 App. Div. 354.

170 Walsh v. Trustees of New York & Brooklyn Bridge, 96 N. Y. 427.

171 Bonnell v. Griswold, 68 N. Y. 294; Bogardus v. New York Life Ins. Co., 101 N. Y. 328; Buffalo Catholic Inst. v. Bitter, 87 N. Y. 250; Schantz v. Oakman, 163 N. Y. 148; Greeff v. Equitable Life Assur. Soc. 160 N. Y. 19.

172 Feeley v. Wurster, 25 Misc. 544.

173 Wheelock v. Lee, 74 N. Y. 495.

174 Cutler v. Wright, 22 N. Y. 472, 482. For dissenting opinion of Clarke, J., see page 487, where it is held that proceeding to try the issues of fact before a jury is practically a withdrawal of the demurrer.

175 Sherman v. Jenkins, 70 Hun, 593, 53 State Rep. 780.

176 McCullough v. Pence, 85 Hun, 271; Brown v. Saratoga R. Co., 18 N. Y. 495.

177 Mercantile Trust Co. v. Atlantic Trust Co., 86 Hun, 213, 66 State Rep. 808; Wilmore v. Flack, 16 Wkly. Dig. 236; Harvey v. Brisbin, 16 State Rep. 42; Clark v. Poor, 73 Hun, 143, 56 State Rep. 122; King v. Townshend, 78 Hun, 380, 60 State Rep. 739; Village of Little Falls v. Cobb, 80 Hun, 20, 61 State Rep. 606; Metzger v. Carr, 79 Hun, 258, 61 State Rep. 14.

claim,[178] or to a reply.[179] In other words, if plaintiff demurs to all or a part of the answer, defendant may claim that the complaint is defective in matter of substance and if the court so finds, then the demurrer must be overruled and judgment given for defendant.[180] This rule does not, however, apply to matters of form.[181] The prior pleadings may be attacked only on some ground on which they might have been successfully demurred to.[182]

§ 899. Decision on demurrer.

On deciding a demurrer, the court should file either an order or a decision. The Code requires a "decision" and it has been held thereunder that an "order" is insufficient,[183] though the later cases hold that an "order" is a "decision" within this Code rule.[184] It would seem the safer practice, in this conflict of authority, to file a decision rather than an order. The decision must be in writing,[185] and filed in the clerk's office within twenty days after the final adjournment of the term, where the issue was tried.[186] It need not include any finding of fact but must direct the final or interlocutory judgment to be entered thereon.[187] Where it directs an interlocutory judgment

[178] Williams v. Boyle, 1 Misc. 364, 48 State Rep. 713; Reeves v. Bushby, 25 Misc. 226.

[179] Henriques v. Yale University, 28 App. Div. 354; Corning v. Roosevelt, 25 Abb. N. C. 220, 18 Civ. Proc. R. (Browne) 399, 33 State Rep. 154; Balz v. Underhill, 19 Misc. 215, 78 State Rep. 419.

[180] Baxter v. McDonnell, 155 N. Y. 83; Lewis v. Cook, 150 N. Y. 163.

[181] Yates v. Burch, 13 Hun, 622.

[182] Schwab v. Furniss, 6 Super. Ct. (4 Sandf.) 704; Douglas v. Coonley, 84 Hun, 158, 65 State Rep. 729.

[183] Thompson v. Stanley, 29 Abb. N. C. 11; Village of Palmyra v. Wynkoop, 53 Hun, 82.

[184] Garrett v. Wood, 57 App. Div. 242; Garland v. Van Rensselaer, 71 Hun, 1.

See, also, Eaton v. Welis, 82 N. Y. 576.

[185] Code Civ. Proc. § 1010; Village of Palmyra v. Wynkoop, 53 Hun, 82.

[186] Code Civ. Proc. § 1010.

[187] Code Civ. Proc. § 1021; Smith v. Rathbun, 88 N. Y. 660; United States Life Ins. Co. v. Jordan, 46 Hun, 201; Unckles v. Hentz, 10 App. Div. 165.

The party demurring is not in default until the entry of an inter-

with leave to amend, answer over, or divide up the action into two or more, it "may" also direct the final judgment to be entered if the party fails to comply with any of the directions given or terms imposed;[188] but a judgment dismissing the complaint cannot be entered at once on overruling a demurrer to the answer.[189] Only one final judgment can be entered on an interlocutory judgment.[190] If the decision does not give leave to enter final judgment, application therefor must be made, in case of failure to amend or plead over.[191] The decision must definitely fix the terms of the interlocutory judgment to be entered,[192] but it need not be in any stated form or prescribed words.[193] It need not direct "both" interlocutory and final judgments.[194]

As to the sufficiency of the "decision," it is held that a decision embodied in an order and directing the entry of an interlocutory judgment, signed as decisions are usually signed and not directed to be entered, is sufficient.[195] A decision sustaining a demurrer need not state the ground on which it was sustained.[196]

A demurrer cannot be sustained in part and overruled in part,[197] nor can it be sustained as to one of the parties jointly demurring and overruled as to the others.[198]

The decision, either at a general or special term, or in the court of appeals, may, in the court's discretion, allow the

locutory judgment. Quereau v. Brown, 63 Hun, 175. And the time given to plead does not begin to run until the entry thereof. Riggs v. Stewart, 14 Civ. Proc. R. (Browne) 141.

188 Code Civ. Proc. § 1021; Crasto v. White, 52 Hun, 473.

189 Gabay v. Doane, 66 App. Div. 507.

190 Crichton v. Columbia Ins. Co., 81 App. Div. 614.

191 Liegeois v. McCrackan, 22 Hun, 69.

192 United States Life Ins. Co. v. Jordan, 46 Hun, 201.

193 Funson v. Philo, 27 Misc. 262.

194 Thompson v. Stanley, 29 Abb. N. C. 11, 22 Civ. Proc. R. (Browne) 421.

195 Morse v. Press Pub. Co., 49 App. Div. 375.
See, also, Funson v. Philo, 27 Misc. 262.

196 Cleghorn v. Cleghorn, 61 State Rep. 4, 29 N. Y. Supp. 432.

197 Anderton v. Wolf, 41 Hun, 571.

198 Oakley v. Tugwell, 33 Hun, 357.

party in fault to plead anew or amend upon such terms as are just.[199] In other words, if the demurrer is overruled, the court may grant leave to answer or reply; if the demurrer is sustained, the court may grant leave to amend. If a demurrer to a complaint is allowed because two or more causes of action have been improperly united, the court may, in its discretion, and upon such terms as are just, direct that the action be divided into as many actions as are necessary for the proper determination of the causes of action therein stated.[200] It will be noticed that it is within the discretion of the court to refuse to allow an amendment[201] or to plead over.[202] Leave to amend is seldom refused, however, except where it appears that under no circumstances can the pleading be made good,[203] as where the complaint has been once amended after a demurrer has been sustained thereto.[204] On overruling a demurrer, leave will generally be given to answer,[205] whereupon the demurrant must either answer or submit to judgment.[206] Leave to amend the part of the pleading demurred to, will not warrant an amendment of any other part of the pleading,[207] but if an amendment is permitted as to several defenses, all need not be amended,[208] though the parts not amended are deemed out of the case.

The interlocutory judgment to be entered should correspond to the decision or order. If a party omits to appeal from the

199 Code Civ. Proc. § 497.

200 Code Civ. Proc. § 497; Robinson v. Judd, 9 How. Pr. 378.

201 Fisher v. Gould, 81 N. Y. 228.

202 Simson v. Satterlee, 64 N. Y. 657.

203 Snow v. Fourth Nat. Bank, 30 Super. Ct. (7 Rob.) 479; Lowry v. Inman, 6 Abb. Pr., N. S., 394; Tuthill v. City of New York, 29 Misc. 555; Henriques v. Yale University, 28 App. Div. 354; Brown v. Tracy, 9 How. Pr. 93.

204 Lowry v. Inman, 6 Abb. Pr., N. S., 394; Higgins v. Gedney, 25 Misc. 248.

205 Cazeaux v. Mali, 25 Barb. 578; Mead v. Mali, 15 How. Pr. 347; Piper v. Hoard, 19 State Rep. 303, 3 N. Y. Supp. 842.

206 Whiting v. City of New York, 37 N. Y. 600.

207 Fielden v. Carelli, 26 How. Pr. 173.

208 Decker v. Kitchen, 21 Hun, 332.

judgment, he cannot thereafter question the decision of the court.[209]

After demurrer to a complaint has been overruled, defendant may, where leave to answer has been given, set up the same ground as a defense, as that urged in support of the demurrer.[210] The decision should not, in addition to allowing an amendment, contain a provision that defendant have leave to make other parties defendant.[211] On overruling a demurrer, the general practice is to impose the costs on the unsuccessful party with leave to him to answer within twenty days after entry and service of interlocutory judgment. The costs which may be imposed on sustaining or overruling a demurrer will be more fully considered in a subsequent chapter.[212] If a demurrer is sustained on the ground that the facts do not show a joint cause of action, decision on the demurrer should be for defendant with leave to the one who ought to have sued alone to amend on payment of costs.[213]

After judgment has been entered upon an order overruling a demurrer with leave to amend, which leave has not been availed of, it is generally indiscreet and imprudent for a court to vacate the judgment and to grant leave to withdraw the demurrer, and to plead.[214] If defendant, instead of availing himself of leave to answer, appeals, the appellate court may allow him to plead anew or amend, on such terms as are just,[215] or may allow the appellant to apply to the special term for leave to answer over but such leave is not conclusive as to his right to such relief, though where the usual requirements are met and an affirmative defense proposed, which may be sufficient, leave may be granted on compliance with strict

[209] Lawrence v. Church, 32 State Rep. 751.

[210] Smith v. Britton, 2 Thomp. & C. 498; Ryan v. City of New York, 42 Super. Ct. (10 J. & S.) 202.

[211] Drake v. Satterlee, 41 State Rep. 576.

[212] See chapter in succeeding volume pertaining to costs.

[213] Mann v. Marsh, 35 Barb. 68, 21 How. Pr. 372.

[214] Fisher v. Gould, 81 N. Y. 228.

[215] Code Civ. Proc. § 497.

[216] Terry v. Moore, 12 App. Div. 396; Bearns v. Gould, 77 N. Y. 455.

terms.[216] But such leave should not be given unless a meritorious defense is shown.[217] The withdrawal of a demurrer and substituting an answer therefor makes the demurrer unavailable to either party for any purpose.[218]

Form of decision overruling demurrer.

The defendant ——— having demurred to the complaint herein on the grounds ———, and said demurrer having come duly on to be heard by the court at a special term held by the undersigned, now after hearing ——— of counsel for said defendant in support of said demurrer, and ——— plaintiff's attorney in opposition thereto; and after reading the complaint herein filed ——— and upon reading and filing said demurrer, and upon due deliberation thereof, I do make the following decision and conclusions of law:

I. (State briefly the finding on the demurrer.)

II. That the plaintiff is entitled to interlocutory judgment overruling said demurrer with costs, which are hereby awarded to the plaintiff to be paid by said defendant to the plaintiff, but with leave, however, to said defendant to answer plaintiff's complaint herein within twenty days upon payment of costs.

III. And I hereby direct that said costs be adjusted by said clerk of this court, and that interlocutory judgment be entered therein, which shall direct that said demurrer is overruled with costs to the plaintiff to be paid by said defendant ———, but with leave, however, to said defendant ——— to answer the complaint herein within twenty days after the service of said interlocutory judgment upon her attorneys, upon the payment by her to plaintiff's attorney, within twenty days, of said costs so to be adjusted, as aforesaid, and to be included in said interlocutory judgment.

IV. And I further direct that in case of the failure of defendant to pay said costs and serve an answer within twenty days after the service of the interlocutory judgment on her attorney, plaintiff may enter final judgment against defendant for ———.

[Date.] [Signature of Judge.][219]

—— Decision sustaining demurrer.

[Use same introductory and paragraph I.]

II. That defendant is entitled to an interlocutory judgment sus-

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[217] Osgood v. Whittelsey, 10 Abb. Pr. 134; Terry v. Moore, 12 App. Div. 396.

[218] Wheelock v. Lee, 5 Abb. N. C. 72, 54 How. Pr. 402.

[219] This form is adapted from, and closely corresponds to, the de-

taining the demurrer, with costs to be fixed by the clerk and included therein, and directing that plaintiff, on payment of the costs, have leave to file and serve an amended complaint within twenty days from the time of the service of this interlocutory judgment on his attorney, and that in case of his failure so to do, defendant may enter final judgment against the plaintiff dismissing the complaint with costs.

III. And I direct that judgment be entered as herein indicated.

Form of interlocutory judgment.

This cause having been regularly brought on for trial upon the issue of law found by plaintiff and the demurrer of defendant ——— at a special term of the supreme court, part I, held by ———, one of the justices of this court, who, having heard the parties by their respective counsel, and after due deliberation, has duly made and filed his decision in writing on the ——— day of ———, directing interlocutory judgment to be entered to the following effect:

[Plaintiff's costs having been heretofore adjusted at ———] now on motion of ———, attorney for plaintiff, it is adjudged and decreed that said demurrer be overruled, with costs to the plaintiff to be paid by the defendant, ———, but with leave, however, to said defendant to answer the complaint herein within twenty days after service of this interlocutory judgment, upon her attorney and upon payment by her to plaintiff's attorney within twenty days, of said costs amounting to the sum of ——— as adjusted, as aforesaid, by the clerk of this court.[220]

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cision rendered in Thompson v. Stanley, 29 Abb. N. C. 11, which held that, though it was a very common practice for the prevailing party, after the trial of an issue of law, to enter an "order" sustaining or overruling a demurrer, the practice was clearly wrong, in that a "decision" should be filed in the clerk's office within twenty days after the final adjournment of the term, where the issue was tried, as required by section 1010 of the Code.

[220] This form of an interlocutory judgment is taken from the form used in Thompson v. Stanley, 29 Abb. N. C. 11.

CHAPTER VI.

AMENDMENTS.

§ 900. Introductory.

Amendments may be divided into two classes: amendments before the trial and amendments at or after the trial. Amendments before the trial may be further divided into amendments of course and amendments by leave of court. Furthermore, an amendment is sometimes authorized by a stipulation of the parties, but if the stipulation is merely that an amended pleading may be served without further specification, it has the same effect as an order authorizing an amendment.[1]

A court of record has inherent power to allow an amendment of pleadings in actions tried before it.[2] In addition to this power the Code provides for the allowance of amendments before, at, or after the trial.

In a previous chapter, the Code title relating in general to amendments of process, pleading or other proceedings has

[1] Deyo v. Morss, 144 N. Y. 216.

[2] Christal v. Kelly, 88 N. Y. 285; Weed v. Saratoga & S. R. Co., 19 Wend. 534.

been considered.[3] It has been there stated that a pleading may be cured by verdict and judgment, though insufficient, as where it has failed to allege matter without proof of which the verdict ought not to have been rendered, or where there has been a mistake in the name of the party, description of the property, time, etc.[4] Such omissions, defects, variances or any other of like nature, not being against the right and justice of the matter and not altering the issue between the parties, or the trial, must, when necessary, be supplied and the proceeding amended by the court wherein the judgment is rendered or by the appellate court.[5] And in every stage of the action, the court must disregard an error or defect in the pleadings which does not affect the substantial rights of the adverse party.[6]

Matters arising or discovered after pleading are not ordinarily the subject of an amendment, but are set forth in a supplemental pleading. But to incorporate in an answer supplemental matter by way of amendment violates only a technical rule of pleading, and is without effect on the substantial rights of the parties.[7] And an amendment to an answer may be regarded as a supplemental answer if no objection to the form of the pleading be taken at the trial.[8]

It may be said that all pleadings, including demurrers,[9] so long as they remain on the record,[10] are subjects of amendment.

§ 901. Amendments of course.

The Code provision as to amendments of course is as follows: "Within twenty days after a pleading, or the answer, demurrer or reply thereto, is served, or at any time before the period for answering it expires, the pleading may be once amended by

[3] See ante, §§ 687-695.

[4] Code Civ. Proc. § 721.

[5] Code Civ. Proc. § 722.

[6] Code Civ. Proc. § 723.

[7] Myers v. Rosenback, 9 Misc. 89; Fairmount Coal & Iron Co. v. Hasbrecht, 48 Hun, 206, 15 State Rep. 587, 28 Wkly. Dig. 274; Strong v. Strong, 26 Super. Ct. (3 Rob.) 669, 28 How. Pr. 432.

[8] Knickerbocker Life Ins. Co. v. Nelson, 78 N. Y. 137.

[9] Blum v. Dabritz, 78 N. Y. Supp. 207.

[10] Aymar v. Chase, Code R., N. S., 141, 12 Barb. 301; Schmid v. Arguimban, 46 How. Pr. 105.

the party, of course, without costs, and without prejudice to the proceedings already had. But if it is made to appear to the court, that the pleading was amended for the purpose of delay, and that the adverse party will thereby lose the benefit of a term, for which the cause is or may be noticed, the amended pleading may be stricken out, or the pleading may be restored to its original form, and such terms imposed as the court deems just."[11] This Code provision gives an absolute right to amend once subject to the amended pleading being struck out for cause shown.[12] But only one amendment of course is permissible,[13] though an amendment of course is not precluded by a previous amendment by leave of court.[14] All pleadings are amendable of course, including supplemental pleadings,[15] except that a denial in an answer cannot be amended of course.[16] A party does not waive or prejudice his right to amend his pleading as of course, by an examination of the adverse party as a witness before trial.[17]

—— Time. An amended pleading may be served as of course (1) within twenty days after the original is served, or (2) within twenty days after the answer, demurrer, or reply to the original pleading is served, or (3) at any time before the period for answering the original pleading expires.[18] Thus, a

11 Code Civ. Proc. § 542.

12 Mussinan v. Hatton, 31 Abb. N. C. 254, 8 Misc. 95.

13 White v. City of New York, 13 Super. Ct. (6 Duer) 685; Sands v. Calkins, 30 How. Pr. 1; Mussinan v. Hatton, 8 Misc. 95, 23 Civ. Proc. R. (Browne) 400.

14 Ross v. Dinsmore, 12 Abb. Pr. 4; Lintzenich v. Stevens, 17 State Rep. 862, 3 N. Y. Supp. 394.

15 Divine v. Duncan, 52 How. Pr. 446, 2 Abb. N. C. 328.

16 Farrand v. Herbeson, 10 Super. Ct. (3 Duer) 655; Lampson v. McQueen, 15 How. Pr 345.

17 Stilwell v. Kelly, 37 Super. Ct. (5 J. & S.) 417.

18 Code Civ. Proc. § 542; Seneca County Bank v. Garlinghouse, 4 How. Pr. 174.

Amendment is allowable within twenty days after notice of demurrer. Morgan v. Leland, 1 Code R. 123; Divine v. Duncan, 2 Abb. N. C. 328. But where one defendant served with the complaint demurred and the demurrer was noticed for argument, and nearly three months afterwards another defendant was served with the complaint, plaintiff could not amend the complaint as of course as to the defendant

complaint may be amended of course at any time within twenty days after its service, though defendant has answered in the meantime.[19] So by obtaining, and serving, an extension of time to answer, defendant extends plaintiff's time to serve an amended complaint;[20] but an order extending plaintiff's time to reply will not extend the time within which he may serve an amended complaint as of course.[21] So a defendant whose demurrer has been overruled with leave to plead anew, and who has served an answer thereunder, has the right as of course to serve an amended answer within twenty days after service of the former answer.[22] So defendant may serve an amended answer as of course within twenty days after the service of a reply.[23] But the complaint cannot be amended as of course, within twenty days after service of plaintiff's reply to defendant's counterclaim, the time for joining issue on the complaint having expired, and the issues joined.[24]

Plaintiff's noticing the cause for trial before the time expires for defendant to amend as of course, is at his peril, since it does not affect defendant's right to amend his answer as of course.[25] Hence a party does not waive his right to amend as of course by his noticing the issues for trial.[26] But where defendant, in pursuance of the conditions of an order giving him further time to answer, waives notice of trial, and consents to place the cause on the calendar, and after that has been done consents to a reference of the issues, he waives his right to

who had demurred though the amendment was claimed within twenty days of the time the last complaint was served. George v. Grant, 56 How. Pr. 244. But the objection that an amended complaint was served without leave of the court and after the time to amend as of course had passed, is waived by the service of an answer thereto. Duval v. Busch, 21 Abb. N. C. 214, 14 Civ. Proc. R. (Browne) 6.

19 Clor v. Mallory, 1 Code R. 126.

20 Albert Palmer Co. v. Shaw, 64 How. Pr. 80.

21 Dawson v. Bogart, 10 Civ. Proc. R. (Browne) 56.

22 Rodkinson v. Gantz, 26 Misc. 268.

23 Seaman v. McClosky, 23 Misc. 445.

24 Holm v. Appelby, 27 Misc. 49.

25 Washburn v. Herrick, 4 How. Pr. 15.

26 Duyckinck v. New York El. R. Co., 49 Super. Ct. (17 J. & S.) 244; Clifton v. Brown, 27 Hun, 231; overruling Phillips v. Suydam, 6 Abb. Pr., N. S., 289.

serve an amended answer raising new issues, as by setting up a counterclaim.[27]

It has been held that a pleading served by mail can be amended as of course within forty days only where the pleading is one which requires an answer; and that if no answer is required, twenty days is the time limit.[28] But it has also been held that in no case can a party by serving his original pleading by mail, double his time to serve an amended pleading inasmuch as the adverse party is the one who acquires double time under section 798 of the Code.[29]

—— **Subject-matter.** The amendment may add new allegations,[30] or omit an allegation so as to preclude the granting of an order for a bill of particulars,[31] or strike out one of the causes of action,[32] or even set up an entirely new cause of action.[33] The answer may be amended as of course by setting up an entirely new defense,[34] such as the statute of limitations.[35] The addition of a verification is not an amendment,[36] nor is the striking out of a demurrer in a pleading consisting of an answer and a demurrer.[37]

Under the old Code, it was held that the place of trial might be changed by an amendment of course;[38] but since the present Code which provides that the summons must contain the name of the county in which the plaintiff desires trial, if the action is in the supreme court, an amendment of the com-

27 Schwab v. Wehrle, 14 Wkly. Dig. 529.

28 Toomey v. Andrews, 48 How. Pr. 332; followed by Ward v. Gillies, 19 Civ. Proc. R. (Browne) 40.

29 Armstrong v. Phillips, 20 Civ. Proc. R. (Browne) 399.

30 Thompson v. Minford, 11 How. Pr. 273.

31 Smith v. Pfister, 39 Hun, 147.

32 Watson v. Rushmore, 15 Abb. Pr. 51.

33 Mason v. Whitely, 11 Super. Ct. (4 Duer) 611, 1 Abb. Pr. 85; Brown v. Leigh, 49 N. Y. 78; overruling Hollister v. Livingston, 9 How. Pr. 140; Field v. Morse, 8 How. Pr. 47.

34 McQueen v. Babcock, 3 Abb. App. Dec. 129, 3 Keyes, 428; Wyman v. Remond, 18 How. Pr. 272.

35 McQueen v. Babcock, 3 Abb. App. Dec. 129, 3 Keyes, 428; Wyman v. Remond, 18 How. Pr. 272.

36 George v. McAvoy, 6 How. Pr. 200, Code R., N. S., 318.

37 Howard v. Michigan Southern R. Co., 5 How. Pr. 206, 3 Code R. 213.

38 Stryker v. New York Exch. Bank, 42 Barb. 511.

plaint, of course, as to the place of trial is insufficient to change the place of trial from that designated in the summons.[39]

—— **Withdrawal of demurrer and service of answer.** The question whether a party may, as of course, withdraw a demurrer and serve an answer as an amendment thereto and thereby lengthen the time to answer from twenty to forty days, has been the subject of many conflicting decisions but the rule is now settled by the court of appeals,[40] that such practice is not permissible though when a party has made a mistake by serving a demurrer when he should have served an answer, he can be relieved by an application to the court for substitution which the court may allow in furtherance of justice on such terms as it may consider just.[41]

—— **Striking out amended pleading.** In order to authorize the striking out of an amended answer as served for the purpose of delay, as provided for in the Code section set forth above, it must not only appear that it was served for such purpose, but that its effect would be to prevent a trial at the ensuing term, and if defendant offers to stipulate to try the cause at that term, for which plaintiff has noticed it, there is no case made for striking out the answer.[42] So the amended pleading will not be stricken out where the plaintiff's notice of trial for the approaching term was irregular and properly returned by the defendant, and the case is therefore in a position where the plaintiff could not move it for trial at that term.[43] And if defendant has postponed serving its answer for five months, it will not be heard to claim that an amended complaint, containing pertinent and essential allegations, was served for purpose of delay.[44] On the other hand, if the amend-

[39] Wadsworth v. Georger, 18 Abb. N. C. 199.

[40] Cashman v. Reynolds, 123 N. Y. 138.

[41] For decisions of supreme court in accordance with this rule, see Wise v. Gessner, 47 Hun, 306; Smith v. Laird, 44 Hun, 530.

For note on withdrawal and substitution of pleadings, see 20 Abb. N. C. 4.

[42] Harney v. Provident Sav. Life Assur. Soc., 41 App. Div. 410.

See, also, Taylor v. Carson, 53 App. Div. 627, 65 N. Y. Supp. 729.

[43] Conquest v. Barnes, 16 Civ. Proc. R. (Browne) 268.

[44] Pritchard v. Nederland Life Ins. Co., 38 App. Div. 111.

ment is made in good faith, and not for the purpose of delay, it cannot be stricken out, although the effect may be to deprive the opposing party of the benefit of a term.[45] If the amended pleading is substantially the same as the original in legal effect, differing only in phraseology, it should be stricken out, on motion.[46] But obtaining an extension of time to answer or demur to an amended complaint is a waiver of the objection that the amendment was made for the purpose of delay.[47]

—— **Service of amended pleading and subsequent proceedings.** A copy of the amended pleading must be served upon the attorney for the adverse party. A failure to demur to, or answer the amended pleading, within twenty days thereafter, has the same effect as a like failure to demur to, or answer the original pleading.[48]

§ 902. Amendments by leave of court before trial.

The court may, at any stage of the action, "in furtherance of justice," and on such terms as it deems just, amend any pleading by adding or striking out the name of a person as a party, or by correcting a mistake in the name of a party or a mistake in any other respect, or by inserting an allegation material to the case.[49] When a case comes within the scope of this Code provision, and there is no bad faith nor wanton delays imputed to the party applicant, the court usually permits an amendment as a matter of course.[50] The question whether the court at special term before the trial has power to permit a new cause of action to be added by amendment is now settled in the affirmative,[51] and such rule applies though the new cause of action is barred by the statute of limitations, where the amend-

[45] Griffin v. Cohen, 8 How. Pr. 451.

[46] Snyder v. White, 6 How. Pr. 321.

A motion to strike out should be made instead of a motion to dismiss. Stanton v. King, 76 N. Y. 585.

[47] Smith v. Pfister, 39 Hun, 147.

[48] Code Civ. Proc. § 543.

For general rules relating to service of pleadings, see ante, §§ 816-818.

[49] Code Civ. Proc. § 723.

[50] Schreyer v. City of New York, 39 Super. Ct. (7 J. & S.) 277.

[51] Deyo v. Morss, 144 N. Y. 216; Thilemann v. City of New York, 71 App. Div. 595.

ment is in furtherance of justice,[52] but an inconsistent cause of action cannot be added,[53] and all the causes set forth in the amended complaint must be of the same class.[54] The form of the action may be changed before trial from contract to tort,[55] or from tort to contract.[56] So an amendment changing the cause of action from replevin to conversion is permissible.[57] But the power to change the nature of the action will be exercised with great circumspection, and be denied if plaintiff has been guilty of laches, or defendant will be deprived of an important advantage gained by him.[58] Thus, it is not "in furtherance of justice" to allow a complaint to be amended by setting up a new cause of action where a counterclaim in the answer has not been replied to, though the time has elapsed and a motion for leave to serve a reply has been denied.[59] Plaintiff may amend by striking out one of his causes of action,[60] though a counterclaim has been interposed.[61] But after dismissal of a complaint seeking only equitable relief an amendment in order to continue it as an action at law will not be allowed.[62]

A new defense may be set up, by amendment before the trial,[63] but where such new defense is inconsistent with an existing

[52] Rowell v. Moeller, 91 Hun, 421; Sheldon v. Adams, 18 Abb. Pr. 405; Hatch v. Central Nat. Bank, 78 N. Y. 487; Eighmie v. Taylor, 39 Hun, 366; Elting v. Dayton, 67 Hun, 425.

But the power of the court to allow amendment of the pleadings so as to set up a cause of action barred by the statute of limitations should rarely be exercised, and only under circumstances showing that the party has pursued his rights with diligence and has been without fault placed in the dilemma. Eggleston v. Beach, 33 State Rep. 835, 19 Civ. Proc. R. (Browne) 288.

[53] Scheier v. Tyrrell, 23 Wkly. Dig. 476.

[54] Mussinan v. Hatton, 31 Abb. N. C. 254, 8 Misc. 95, 60 State Rep. 159, 23 Civ. Proc. R. (Browne) 400.

[55] Eighmie v. Taylor, 39 Hun, 366.

[56] Hopf v. United States Baking Co., 48 State Rep. 729.

[57] Goddard v. Cassell, 84 Hun, 43, 65 State Rep. 74.

[58] Rowland v. Kellogg, 26 Misc. 498.

[59] Rowland v. Kellogg, 26 Misc. 498.

[60] Brown v. Leigh, 49 N. Y. 78.

[61] Felix v. Van Slooten, 43 State Rep. 791, 17 N. Y. Supp. 844.

[62] Marsh v. Kaye, 44 App. Div. 68.

[63] Diamond v. Williamsburgh Ins. Co., 4 Daly, 494.

general denial, the latter should be stricken out.[64] So the answer may be amended upon defendant's motion before trial by striking out the counterclaim.[65] The old rule whereby so-called unconscionable defenses, such as the statute of limitations or the defense of usury, could not be added by amendment has been abrogated,[66] and now the statute of limitations,[67] or the defense of usury,[68] may be set up by amendment before trial, except where it would be grossly inequitable to permit such an amendment.[69] The "furtherance of justice" may call for a denial of a motion to amend an answer so as to set up the statute of limitation,[70] or the statute of frauds.[71]

An amendment is deemed to have been made before trial, where application is made on the trial, but the trial is suspended and the case put over the term to enable plaintiff to apply at special term for leave to amend.[72] So when the propriety of setting up a counterclaim first appears during the trial before a referee, the trial may be suspended, and upon application to the special term an order may be obtained permitting defendant to amend his answer by setting up that or any other new defense.[73]

§ 903. Amendments by leave of court on the trial.

The court may, upon the trial, in furtherance of justice, and on such terms as it deems just, "amend any * * * pleading * * * by adding or striking out the name of a person as a party or by correcting a mistake in the name of the party, or a mistake in any other respect, or by inserting an allegation

64 Marx v. Gross, 58 Super. Ct. (26 J. & S.) 221, 18 Civ. Proc. R. (Browne) 352, 31 State Rep. 403, 9 N. Y. Supp. 719.

65 Knauth v. Wertheim, 26 Abb. N. C. 369.

66 Gilchrist v. Gilchrist's Ex'rs, 44 How. Pr. 317; Union Nat. Bank of Troy v. Bassett, 3 Abb. Pr., N. S., 359.

67 Gerdau v. Faber, 26 App. Div. 606.

68 Barnett v. Meyer, 10 Hun, 109; Union Nat. Bank of Troy v. Bassett, 3 Abb. Pr., N. S., 359.

69 Salisbury v. Bennett, 25 Civ. Proc. R. (Scott) 306.

70 Wiegel v. Mogk, 46 App. Div. 190.

71 Stern v. Doheny, 29 Misc. 711.

72 Shannon v. Pickell, 2 State Rep. 160. See, also Maders v. Whallon, 74 Hun, 372.

73 Mitchell v. Bunn, 2 Thomp. & C. 486.

material to the cause, or where the amendment does not change substantially the claim or defense by conforming the pleading * * *[74] to the facts proved." A referee has the same power of amendment, on the trial of an action before him, as has the court.[75] The only limitation on the "power" of amendment at the trial is that no new cause of action or defense be incorporated,[76] but even this limitation does not apply where the motion to amend is made at the opening or during the early stages of the trial, before evidence is introduced or other material steps taken.[77] And an amendment changing the form of the action only, is permissible where it does not substantially change the claim.[78]

Whether, in a proper case, an amendment will be granted on the trial rests in the discretion of the court,[79] which should

[74] Code Civ. Proc. § 723.

[75] Code Civ. Proc. § 1018; Perry v. Levenson, 82 App. Div. 94.

[76] Harris v. Tumbridge, 83 N. Y. 92; Mahon v. City of New York, 10 Misc. 664, 64 State Rep. 301, 1 Ann. Cas. 361.

The complaint cannot be amended on the trial so as to change the cause of action or to set up a new cause of action. Wheeler v. Hall, 54 App. Div. 49; Clements v. Beale, 53 App. Div. 416; Laufer v. Boynton Furnace Co., 84 Hun, 311, 65 State Rep. 560; Southwick v. First Nat. Bank of Memphis, 84 N. Y. 420; Burns v. Walsh, 10 Misc. 699, 64 State Rep. 492; Spies v. Lockwood, 40 App. Div. 296, 29 Civ. Proc. R. (Kerr) 164; Freeman v. Grant, 132 N. Y. 22; Shafarman v. Jacobs, 15 Misc. 10; Hecla Powder Co. v. Hudson River Ore & Iron Co., 7 Misc. 630, 58 State Rep. 363, 23 Civ. Proc. R. (Browne) 341; Miller v. King, 84 Hun, 308, 65 State Rep. 490; Klemm v. New York Cent. & H. R. R. Co., 78 Hun, 277, 60 State Rep. 231; Buffalo & Grand Island Ferry Co. v. Allen, 12 Civ. Proc. R. (Browne) 64; Mea v. Pierce, 63 Hun, 400, 44 State Rep. 356, 18 N. Y. Supp. 293.

An answer cannot be amended at the trial so as to set up a new defense. Abbott v. Meinken, 48 App. Div. 109; Seaman v. Clarke, 60 App. Div. 416; Drake v. Siebold, 81 Hun, 178, 62 State Rep. 694; Crompton & Knowles Loom Works v. Brown, 28 Misc. 513; Schmitt v. National Life Ass'n, 84 Hun, 128, 65 State Rep. 737; Alden v. Clark, 86 Hun, 357, 67 State Rep. 154; Robeson v. Central R. Co. of New Jersey, 76 Hun, 444, 59 State Rep. 180; McElheny v. Minneci, 44 App. Div. 640, 60 N. Y. Supp. 610.

[77] Stratton v. City Trust, Safe Deposit & Surety Co., 69 App. Div. 322; Maders v. Whallon, 74 Hun, 372.

[78] Oregon Steamship Co. v. Otis, 27 Hun, 452.

[79] Johannessen v. Munroe, 84 Hun, 594, 66 State Rep. 142.

depend largely on whether the amendment will further justice.[80]

Amendments allowable on the trial may be divided as follows:

1. Amendments as to parties by adding or striking out the name of a person as a party or by correcting a mistake in the name of the party. The amendments allowable in respect to parties have been fully considered in the chapter relating to the summons and the same rules therein laid down are applicable to amendments of pleadings. Suffice it to reiterate without further citation of cases, that while the Code authorizes the adding or striking out of the name of a person or party or the correction of a mistake in such name or a change in the description of the party, it does not sanction an entire change of name of the defendant by substitution of another or entirely different defendant.[81] And a new party will not be allowed to be brought in by amendment if the statute of limitations has run in his favor.[82] And a new party cannot be added by amendment in violation of the Code provisions relating to the bringing in of new parties.[83] It has also been stated that where a defendant's name is unknown or where the defendant himself is unknown, the summons and complaint may designate him by a fictitious name or description, but the Code requires that when the name becomes known the pleading must be amended accordingly.

2. Amendment to correct any mistake in the pleading, other than mistakes relating to parties.[84] For instance, a complaint may be amended at the trial so as to allege that defendant was incorporated in New Jersey instead of New York.[85] So an amendment on the trial is allowed to correct purely technical

[80] Harrington v. Slade, 22 Barb. 161.

[81] For collection of cases relating to amendments as to parties, see 10 Abb. Cyc. Dig. 539-545.

[82] Shaw v. Cock, 12 Hun, 173.

[83] Heffern v. Hunt, 8 App. Div. 585.

[84] Heine v. Rohner, 29 App. Div. 239; Weill v. Metropolitan Ry. Co., 10 Misc. 72, 63 State Rep. 170; 24 Civ. Proc. R. (Scott) 85, 1 Ann. Cas. 40; Sulzbacher v. J. Cawthra & Co., 14 Misc. 544, 70 State Rep. 766.

[85] Stuart v. New York Herald Co., 73 App. Div. 459.

defects.[86] And an amendment of the answer is proper to make a denial specific.[87]

A pleading may be amended at the trial by striking out allegations as well as by adding them. For instance, a complaint may be amended at the trial by striking out words sounding in tort, if it then states a complete cause of action on contract, and the defense is not surprised or misled.[88] So an irrelevant portion of a pleading may be stricken out by amendment[89] if the cause of action is not changed,[90] but after plaintiff has closed his case it is proper to refuse to allow an amendment to the answer by striking out an admission therein of an allegation made in the complaint.[91] Whether a pleading may be amended at the trial by withdrawing an admission is within the discretion of the court;[92] but a complaint in an action for conversion, containing an express waiver of the tort, cannot, on the trial, be amended by striking out the waiver.[93]

3. Amendment inserting material allegations. While a new cause of action, or a new defense, cannot be added by amendment at the trial yet a material allegation as to the cause of action, or defense, alleged, may be added. So an equitable circumstance, not stated in the complaint, may be introduced by way of amendment at the trial, at the discretion of the court, if its insertion be necessary.[95] And an amendment may be allowed at the trial to show the residence of the parties,[96] or to

[86] Hennequin v. Clews, 46 Super. Ct. (14 J. & S.) 330.

[87] American Distributing Co. v. Ashley, 87 Hun, 225, 67 State Rep. 734, 33 N. Y. Supp. 1049.

[88] Beckwith v. Rochester Iron Mfg. Co., 12 Wkly. Dig. 528, 25 Hun, 59.

[89] Bosworth v. Higgins, 26 State Rep. 474, 7 N. Y. Supp. 210.

[90] Hitchcock v. Baere, 17 Hun, 604.

[91] Miner v. Baron, 39 State Rep. 893, 15 N. Y. Supp. 491.

[92] Valentine v. Healey, 1 App. Div. 502, 72 State Rep. 612; Strong v. Dwight, 11 Abb. Pr., N. S., 319.

[93] Cushman v. Jewell, 7 Hun, 525.

[95] Marie v. Garrison, 13 Abb. N. C. 210.

[96] Voshefskey v. Hillside Coal & Iron Co., 21 App. Div. 168; Jenkins v. Hall, 66 State Rep. 201, 32 N. Y. Supp. 883.

change the demand for relief,[97] as by increasing the amount claimed as damages.[98]

4. An amendment to conform the pleading to the proofs, is permissible where it does not "change substantially the claim or defense." When a cause of action, however stated, is sustained by the same proof, the power of the court to conform the statement in the pleadings to the facts proved is undoubted.[99] Cases frequently arise where the proof shows formal and unimportant differences from the allegations made of the facts in the pleadings. No actual necessity for amendment exists in those cases under ordinary circumstances; for neither party can be usually misled to his prejudice by means of such variances. When, however, the fact may be otherwise, there the party alleging it must support it by his affidavit, and then the pleading can only be amended upon such terms as shall be just. But when no such affidavit is made, the variance may be disregarded, and the fact found according to the evidence, or an immediate amendment may be ordered without costs.[100] No variance between the allegations contained in a pleading and the proof is to be deemed material, unless it may actually mislead the adverse party to his prejudice, in maintaining his action or defense, on the merits. This is a very broad and comprehensive provision, limited only by the restriction, that, when the cause of action or defense, as it may have been alleged, is unproved, not merely in some particular or particulars, but in its entire scope and meaning, then the case shall not be considered one of variance, but a failure of proof.[101] That is the only qualification to which the preceding general Code provision, requiring mere variances to be disregarded, has been subjected.[102] Even in a usury case an amendment to conform to the proof

[97] Beck v. Allison, 56 N. Y. 366; Dows v. Green, 3 How. Pr. 377; Dubois v. Hull, 43 Barb. 26; National Steamship Co. v. Sheahan, 122 N. Y. 461.

[98] Reed v. City of New York, 97 N. Y. 620; Zimmer v. Third Ave. R. Co., 36 App. Div. 265.

[99] Martin v. Home Bank, 160 N. Y. 190.

[100] Code Civ. Proc. §§ 539, 540; Hauck v. Craighead, 4 Hun, 561; Farmers' & Mechanics' Bank of Genesee v. Joslyn, 37 N. Y. 353.

[101] Code Civ. Proc. §§ 539, 541; Hauck v. Craighead, 4 Hun, 561.

[102] Hauck v. Craighead, 4 Hun, 561.

is allowable, if in fact it is necessary.[103] And where, in an action, defendants themselves prove a cause of action against themselves, an amendment may be allowed to conform the pleading to the proof.[104]

As already stated, an amendment to conform the pleadings to the proof is not allowable where the effect of such an amendment would be to introduce a new cause of action or defense,[105] since in such a case there is not a mere variance but a total failure of proof.[106]

A complaint cannot be amended to conform to the facts proved where an objection has been taken in time to the proving of the facts because of the insufficiency of the pleadings;[107] but this rule does not apply where the objection to the evidence is not that it fails to support the allegations of the pleading, but is that the evidence is incompetent and immaterial.[108] The court will not permit an amendment to conform to the proof, where such amendment, if allowed, would take from the pleadings an allegation admitted and relied on by the party charged.[109] So a motion to conform pleadings to proof will not be granted when its effect will be to so amend the complaint that it would appear that there was no cause of action.[110]

An amendment which changes the complaint from one in tort to one on contract is not allowable,[111] and vice versa.[112]

103 Guenther v. Amsden, 16 App. Div. 607; Fay v. Grimsteed, 10 Barb. 321.

104 Bedford v. Terhune, 30 N. Y. 453.

105 Ullman v. Jacobs, 86 Hun, 186, 66 State Rep. 804.

106 Moore v. McKibbin, 33 Barb. 246; Button v. Schuyler's Steam Tow-Boat Line, 40 Hun, 422.

107 Barnes v. Seligman, 55 Hun, 339, 29 State Rep. 68; Beard v. Tilghman, 66 Hun, 12, 49 State Rep. 508; Rutty v. Consolidated Fruit Jar Co., 52 Hun, 492, 24 State Rep. 640; Bossert v. Poerschke, 51 App. Div. 381.

108 Charlton v. Rose, 24 App. Div. 485.

109 Zimmer v. Brooklyn Sub-Railway Co., 23 Abb. N. C. 382, 25 State Rep. 974, 6 N. Y. Supp. 316.

110 Richards v. Fox, 52 Super. Ct. (20 J. & S.) 36.

111 Whitcomb v. Hungerford, 42 Barb. 177; Baldwin v. Rood, 15 Civ. Proc. R. (Browne) 56, 17 State Rep. 517; Smith v. Smith, 4 App. Div. 227, 74 State Rep. 194, 38 N. Y. Supp. 551.

112 Mea v. Pierce, 63 Hun, 400; Lane v. Beam, 19 Barb. 51, 1 Abb. Pr. 65.

So an amendment is not allowable which changes the cause from an equitable to a legal cause of action,[113] and vice versa.[114] Thus, an amendment changing a complaint for negligence to one for the creation of a nuisance entirely changes the ground of action, and will not be allowed on the trial.[115] And a statutory action cannot be changed to a common law action.[116] And an action based on one statute cannot be changed by amendment so as to base it on another different statute.[117] An amendment which changes the nature of defendant's liability will not be allowed at the trial, since it introduces a new cause of action.[118] And an amendment at the trial cannot be allowed to change an action for a separation into an action for an absolute divorce.[119] So an amendment of a complaint to recover sums embezzled, so as to increase the amount by adding other sums embezzled at different times, adds a new cause of action.[120] But an amendment of a complaint by withdrawing a portion of a credit therein admitted does not introduce a new cause of

[113] Halsey v. Tradesmen's Nat. Bank, 56 Super. Ct. (24 J. & S.) 7, 24 State Rep. 953; Sleeman v. Hotchkiss, 36 State Rep. 540; Whittemore v. Judd Linseed & Sperm Oil Co., 32 State Rep. 316, 16 Daly, 290; Bockes v. Lansing, 74 N. Y. 437; Stevens v. City of New York, 84 N. Y. 296. But in an action for specific performance, if the covenant is one of which specific performance can not be decreed, the court may allow an amendment so that a legal remedy may be had, especially if from the lapse of time the statute of limitations may bar another action. Beck v. Allison, 56 N. Y. 366.

[114] Gas-Light Co. of Syracuse v. Rome, W. & O. R. Co., 51 Hun, 119, 24 State Rep. 154; Zoller v. Kellogg, 66 Hun, 194, 49 State Rep. 179.

[115] Fisher v. Rankin, 25 Abb. N. C. 191, 27 State Rep. 582; Moniot v. Jackson, 40 Misc. 197.

[116] Bailey v. Johnson, 1 Daly, 61. But an amendment may be allowed so as to set up the statute of a sister state authorizing a recovery. Lustig v. New York, L. E. & W. R. Co., 65 Hun, 547, 48 State Rep. 916, 20 N. Y. Supp. 477.

[117] Rowell v. Janvrin, 69 Hun, 305.

[118] Smith v. Stagg, 11 Wkly. Dig. 439, 47 Super. Ct. (15 J. & S.) 514; Van Cott v. Prentice, 104 N. Y. 45; Zimmer v. Chew, 34 App. Div 504; Keating v. Stevenson, 21 App. Div. 604; Shuler v. Meyers, 5 Lans 170.

[119] Robertson v. Robertson, 9 Daly, 44; Ohly v. Ohly, 11 Wkly. Dig 129.

[120] Carr & Hobson v. Sterling, 53 Super. Ct. (21 J. & S.) 255.

action,[121] nor does an allegation of special damages sustained.[122] So an amendment asking to set up a claim for damages for the detention of the property, which is the subject of an action of replevin, does not present a new cause of action, but where the principal cause of action is not established the relief sought by the amendment should not be granted.[123]

The test to determine whether a new cause of action is alleged in the amended complaint is whether a recovery had upon the original complaint would be a bar to any recovery under the amended complaint.[124] Another statement of the rule is as follows: "As long as plaintiff adheres to the original contract or injury, declared upon, an allegation of the modes in which the defendant has broken the contract or caused the injury is not an introduction of a new cause of action. The test is whether the proposed amendment is a different matter, another subject of controversy, or the same matter more fully or differently laid to meet the possible scope and variant phase of the testimony."[125]

§ 904. Amendments by leave of court after trial.

The court has the same "power" to amend after the trial or after judgment, as it has on the trial. The Code provision is that "the court may," upon the trial, or at any other stage of the action, before or after judgment, etc.[126] It is within the discretion of the court to allow an amendment on a second or further trial,[127] or on ordering a new trial.[128] But notwithstanding an amendment may be allowed even after judgment,[129] great caution should be observed in such a case to the end that there be no abuse of power. The proposed amend-

121 Price v. Brown, 112 N. Y. 677.

122 Clemons v. Davis, 6 Thomp. & C. 523, 4 Hun, 260.

123 National Steamship Co. v. Sheahan, 122 N. Y. 461.

124 Davis v. New York, L. E. & W. R. Co., 110 N. Y. 646.

125 1 Enc. Pl. & Pr. 564.

126 Code Civ. Proc. § 723.

127 Dennison v. Musgrave, 26 Misc. 871; Hentz v. Havemeyer, 15 App. Div. 357, 78 State Rep. 581; Williams v. United States Mut. Acc. Ass'n, 82 Hun, 268, 63 State Rep. 793, 31 N. Y. Supp. 343.

128 Troy & B. R. Co. v. Tibbits, 11 How. Pr. 168; Evarts v. United States Mut. Acc. Ass'n, 40 State Rep. 878, 16 N. Y. Supp. 27.

129 Whitehead Bros. Co. v. Smack, 20 Misc. 229.

ment must be material to the rights of the parties and in furtherance of justice, as where a party has rested in excusable misapprehension or has been misled intentionally or unintentionally or has mistakenly acquiesced in a supposed state of pleading that was subsequently found not to exist because of which a right was imperiled or lost.[130] And the amendment must be one which sustains the judgment,[131] and hence an amendment after verdict is improper where the effect thereof would be to change the verdict of the jury,[132] and after a trial by the referee, the court will not permit an amendment of the pleadings that will make the referee's judgment irregular.[133] An amendment to conform to the proof is usually made after the evidence is closed, but it may be made after verdict or judgment, though an amendment to conform the answer to the proof has been refused after findings were prepared and ready to be signed by the judge.[134] Subject to the above rules, an amendment after the trial is permissible to render the verdict certain,[135] to include a fact proved without objection, where the cause of action is not thereby changed,[136] to correct an immaterial variance,[137] to strike out one of two inconsistent defenses,[138] or to change the name of a party;[139] but not to avoid

130 Cunliff v. Delaware & Hudson Canal Co., 4 State Rep. 775; Field v. Hawxhurst, 9 How. Pr. 75.

131 Englis v. Furniss, 3 Abb. Pr. 82; Williams v. Birch, 19 Super. Ct. (6 Bosw.) 674.

132 Bradley v. Shafer, 64 Hun, 428.

133 Brady v. Nally, 26 Abb. N. C. 367.

134 Sidenberg v. Ely, 90 N. Y. 257.

135 Emerson v. Bleakley, 2 Abb. App. Dec. 22, 5 Abb. Pr., N. S., 350, 2 Transc. App. 171, 41 How. Pr. 511.

136 Frankfurter v. Home Ins. Co., 10 Misc. 157, 62 State Rep. 521; Lounsbury v. Purdy, 18 N. Y. 515. Where evidence of a new defense was admitted at the trial without objection, and litigated, and the rights of all parties could be provided for by a modification of the decree, objection to an amendment to the pleading after trial as irregular, should not prevail on appeal. Cranford v. City of Brooklyn, 13 App. Div. 151, 77 State Rep. 246, 43 N. Y. Supp. 246.

137 Place v. Minster, 65 N. Y. 89; Lettman v. Ritz, 5 Super. Ct. (3 Sandf.) 734; Debaix v. Lehind, Code R., N. S., 235.

138 Breunich v. Weselman, 100 N. Y. 609.

139 Bank of Havana v. Magee, 20 N. Y. 355.

the effect of express admissions in the pleading,[140] or to change the cause of action.[141] The amount of damages claimed may be amended to conform to the proof after judgment,[142] or after a trial by, and report of, the referee.[143]

§ 905. Application for leave to amend.

A pleading cannot be altered by any person without the direction of the court, or of another court of competent authority, except where an amendment is authorized as of course.[144] But the court may order an amendment of its own motion.[145] An application for leave to amend should be made at the earliest opportunity after the discovery of the necessity therefor. If the necessity is discovered before trial, application should be made by a motion at special term.[146] And a motion may be made at special term even though the cause is pending before a referee.[147] The trial term is not the place to move for amendment of pleadings unless in respect to some feature of the case which has unexpectedly developed on the trial.[148] The trial term often denies the motion but grants leave to withdraw a juror for the purpose of moving at special term. Unimportant variances should either be disregarded entirely, or amended at the trial, and not by motion at special term.[149]

Notice of motion must be given to the opposing party, if he has appeared.[150] The notice must be accompanied by a

140 Browne v. Stecher Lithographic Co., 24 App. Div. 480.

141 Romeyn v. Sickles, 108 N. Y. 650. It is immaterial that defendant was not misled. Southwick v. First Nat. Bank of Memphis, 84 N. Y. 420. But see Hatch v. Central Nat. Bank, 78 N. Y. 487, which held an amendment proper, after judgment, though it "added" a new cause of action barred by limitations.

142 Arrigo v. Catalano, 7 Misc. 515.

143 Davis v. Smith, 14 How. Pr. 187.

144 Code Civ. Proc. § 727.

145 Reck v. Phoenix Ins. Co., 3 Civ. Proc. R. (Browne) 376; Barber v. Marble, 2 Thomp. & C. 114.

146 Cauchois v. Proctor, 1 App. Div. 16.

147 Bullock v. Bemis, 40 Hun, 623.

148 Rhodes v. Lewin, 33 App. Div. 369.

149 Hauck v. Craighead, 4 Hun, 561.

150 Kneeland v. Martin, 2 Month. Law Bul. 56; Stephens v. Hall, 25 Abb. N. C. 300, 19 Civ. Proc. R. (Browne) 37, 32 State Rep. 453.

copy of the proposed amended pleading[151] and an affidavit made by the party. The material facts excusing the failure or negligence necessitating the amendment, so far as they are within the knowledge of the client, must be shown by his affidavit, and the affidavit of the attorney cannot be accepted in lieu of the affidavit of the client, at least until the necessity of making the motion before the affidavit of the client can be procured is shown.[152] It is not a sufficient excuse for failure to present the affidavit of the party that he is not in the county.[153] The affidavit should show that deponent was not aware of the facts at the time of pleading, and excuse laches, if any, in his application.[154] It is insufficient where it merely states that deponent deems the amendment advisable.[155] The motion cannot be granted merely for reasons orally stated by counsel but not contained in motion papers.[156] If an order to show cause is granted, it must show the respect in which the complaint is sought to be amended, and it is not enough to append a paper which may be presumed to be the proposed complaint, without referring to it.[157] The notice of motion for leave to amend should be unconditional[158] and specific[159] but should not be denied because leave is asked to serve a supplemental rather than an amended pleading.[160]

If an amendment of the complaint is allowed on the trial, defendant's affidavit in support of a motion for leave to serve

[151] Stern v. Knapp, 8 Civ. Proc. R. (Browne) 54; Nightengale v. Continental Life Ins. Co., 2 Month. Law Bul. 15; Abbott v. Meinken, 48 App. Div. 109; Lesser v. Gilbert Mfg. Co., 72 App. Div. 147.

[152] Ryan v. Duffy, 54 App. Div. 199; Tompkins v. Continental Nat. Bank, 71 App. Div. 330; Rhodes v. Lewin, 33 App. Div. 369; Phelan v. Rycroft, 27 Misc. 48.

[153] Aborn v. Waite, 30 Misc. 317.

[154] Cocks v. Radford, 13 Abb. Pr. 207. It is not sufficient for the attorney to make an affidavit that the facts have come to "his" knowledge since the service of the pleading. Tompkins v. Continental Nat. Bank, 71 App. Div. 330.

[155] Bewley v. Equitable Life Ins. Co., 10 Wkly. Dig. 191.

[156] Jenkins v. Warren, 25 App. Div. 569.

[157] Ruellan v. Stillwell, 28 Civ. Proc. R. (Kerr) 243.

[158] Noxon v. Glen, 2 State Rep. 661.

[159] Crooks v. Second Ave. R. Co., 49 State Rep. 376.

[160] Frisbie v. Averell, 87 Hun, 217, 67 State Rep. 758.

an amended answer should show not only that it was the opinion of defendant, and of his counsel, that an amendment of the answer and further evidence would be necessary; but also the facts relied upon, in addition to those which had been proved, and he should prove that he was taken by surprise, and specify with reasonable precision and certainty the nature of the evidence which the amendment to the complaint renders material and necessary.[161]

§ 906. Hearing and determination.

On the hearing of a motion for leave to amend the court will consider several matters. The most important question to be determined is whether the amendment will be in "furtherance of justice." Another matter to be considered is whether the moving party has acted promptly. An amendment may be denied because of laches[162] but if no injury has resulted to the opposing party by the delay, the amendment should not be refused because thereof;[163] and delay attributable to the adverse party is not ground for refusal.[164] The moving party ordinarily will not be permitted to set up matters of which he had full knowledge at the time of interposing the original pleading.[165] Hence, facts of which plaintiff had knowledge at the time of the commencement of the action cannot usually be set up by amendment.[166] So an application to amend may be denied where the defect was known on the trial of the action but a motion to amend was not made until after reversal of the judgment on appeal.[167] And it is proper to re-

[161] Dunnigan v. Crummey, 44 Barb. 528.

[162] Wooster v. Bateman, 56 State Rep. 56; Brusie v. Peck, 6 State Rep. 709. But in a penal action, defendant has been allowed to amend by setting up the statute of limitations though he was guilty of laches. Gerdau v. Faber, 26 App. Div. 606.

[163] Van Wickle v. Baron, 5 App. Div. 130.

[164] Bradley v. Sheehy, 2 Wkly. Dig. 589; Farmers' Nat. Bank of Annapolis v. Underwood, 15 App. Div. 626, 44 N. Y. Supp. 121, 78 State Rep. 121, 44 N. Y. Supp. 121.

[165] Cocks v. Radford, 13 Abb. Pr. 207; Harrington v. Slade, 22 Barb. 161; Stedeker v. Bernard, 10 Daly, 466.

[166] Muller v. Muller, 21 Wkly. Dig. 287; Bulen v. Burdell, 11 Abb. Pr. 381.

[167] Guttentag v. Whitney, 81 N. Y. Supp. 701.

fuse to allow an amendment of the answer at the trial where defendants seek to set up a defense known to them when the action was brought, especially where the trial takes place a considerable time after the joinder of issue.[168] But the rule which ordinarily prevails that an amendment of a pleading will not be allowed where there has been laches or delay, should not be so strictly applied in the case of a municipal corporation as in the case of an individual. So far has the rule been relaxed that cases can be found wherein it has been held that public interests are not to suffer by laches in asserting them.[169] The court may also take into consideration the fact that previous amendments have been allowed.[170]

The fact that the statute of limitations has run against a new action, is a strong reason for granting instead of refusing the relief.[171]

The merits of the amendment will not be considered further than to see that the amendment is not plainly frivolous;[172] but when it is made to appear without contradiction that the amendment cannot be sustained by evidence it should not be permitted to be made.[173] And an immaterial,[174] indefinite,[175]

[168] Foerst v. Empire Life Ins. Co., 40 App. Div. 631, 57 N. Y. Supp. 971; Hurlbut v. Interior Conduit & Insulation Co., 8 Misc. 100, 60 State Rep. 162; Johnson v. Atlantic Ave. R. Co., 76 Hun, 12, 59 State Rep. 625; Guiterman v. Liverpool, N. Y. & P. Mail Steamship Co., 9 Daly, 119.

[169] Stemmler v. City of New York, 45 App. Div. 573; Seaver v. City of New York, 7 Hun, 331; Lunney v. City of New York, 14 Wkly. Dig. 140; Brooks v. City of New York, 12 Abb. N. C. 350.

[170] Heyler v. New York News Pub. Co., 71 Hun, 4, 54 State Rep. 68; Nethercott v. Kelly, 57 Super. Ct. (25 J. & S.) 27, 24 State Rep. 171.

[171] Beck v. Allison, 56 N. Y. 366; Elting v. Dayton, 67 Hun, 425.

[172] Paddock v. Barnett, 88 Hun, 381; Turner v. Dexter, 4 Cow. 555; Campbell v. Campbell, 23 Abb. N. C. 187, 1 Silv. Sup. Ct. 140, 23 State Rep. 252; Farmers' Nat. Bank of Annapolis v. Underwood, 78 State Rep. 121, 15 App. Div. 626; Muller v. Muller, 21 Wkly. Dig. 287; Everett v. Everett, 48 App. Div. 475.

[173] Muller v. Muller, 21 Wkly. Dig. 287.

[174] Barron v. Yost, 16 Daly, 441, 35 State Rep. 380; Nicoll v. Hyman, 7 Misc. 186, 57 State Rep. 542, 27 N. Y. Supp. 317.

[175] Ehlein v. Brayton, 50 State Rep. 349; Pramagiori v. Pramagiori, 30 Super. Ct. (7 Rob.) 302.

unnecessary,[176] clearly insufficient,[177] or defective,[178] amendment should not be allowed, nor should an amendment containing inconsistent allegations or which is inconsistent with the allegations in the original pleading.[179] An amended pleading will not be allowed on the ground that the pleading which was served in the action was drawn very hastily.[180] Whether the promulgation of a decision settling a doubtful point of law affords sufficient reason for allowing an amendment of a pleading to meet the new conditions is doubtful.[181] Falsity of proposed amendment, unless clearly apparent, is not ground for refusing leave.[182]

The fact that an amendment of the complaint may affect the defendant's remedies against third persons, is no objection to allowing it to be made,[183] nor is the fact that a proposed amended answer contains a positive denial of the allegations of the complaint, while the original answer only denies them on information and belief.[184] So the right to move at special term is not waived because the party contended before the referee that the pleading was sufficient.[185] But a party who has four

[176] Hurlbut v. Interior Conduit & Insulation Co., 8 Misc. 100, 60 State Rep. 162; Doherty v. Shields, 86 Hun, 303, 67 State Rep. 211; Clark v. Dales, 20 Barb. 42; Harrower v. Heath, 19 Barb. 331; Thorp v. Heyman, 16 Misc. 591, 74 State Rep. 260; Pool v. Ellison, 56 Hun, 108, 30 State Rep. 135. An amendment of a complaint will not be allowed upon the trial for the purpose of adding matters of which the court is bound to take judicial notice, e. g. that a street in a city is a "public" highway. Whittaker v. Eighth Ave. R. Co., 28 Super. Ct. (5 Rob.) 650. But order allowing unnecessary amendment will not be reversed. Hayes v. Kerr, 39 App. Div. 529.

[177] Tovey v. Culver, 54 Super. Ct. (22 J. & S.) 404.

[178] Pracht v. Ritter, 48 Super. Ct. (16 J. & S.) 509.

[179] Salters v. Genin, 10 Abb. Pr. 478, 19 How. Pr. 233; Whittemore v. Judd Linseed & Sperm Oil Co., 32 State Rep. 316, 16 Daly, 290; Salters v. Genin, 8 Abb. Pr. 253; Kent v. Popham, 13 Wkly. Dig. 489.

[180] Jenkins v. Warren, 25 App. Div. 569.

[181] O'Neil v. Hester, 82 Hun, 432.

[182] Hughes v. Heath, 9 Abb. Pr., N. S., 275; Paddock v. Barnett, 88 Hun, 381, 68 State Rep. 772, 34 N. Y. Supp. 834.

[183] Deane v. O'Brien, 13 Abb. Pr. 11.

[184] Shanks v. Rae, 19 How. Pr. 540.

[185] Woolsey v. Shaw, 34 App. Div. 405.

times amended his pleading and each time admitted the contract sued on will not be allowed to further amend by denying the contract.[186]

§ 907. Order.

The order granting or refusing leave to amend should be clear and specific, and within the scope of the motion.[187] A mere remark by the court that the amendment will be allowed is insufficient to authorize the entry of an order after judgment permitting a specific amendment.[188] If the order grants the motion, it should designate the word or words to be added to, or stricken from, the pleading.[189] An order to amend by "alleging a cause of action against said defendant," is too broad,[190] as is an order giving permission to amend in any way the party deems proper.[191] On allowing an amendment introducing a new cause of action, or allegations necessary to complete facts alleged, which otherwise would not show a cause of action, defendant should be allowed to answer as a matter of right.[192] And an order allowing an amendment cannot deprive defendant of his right to answer the new issue thus tendered by direction of compulsory reference in the same order.[193] The time to answer after the amendment cannot be limited to less than the statutory period.[194] If an amendment is allowed during the trial, the court may grant a postponement and permit the case to go over the term.[195]

[186] Aborn v. Waite, 30 Misc. 317.

[187] Breunich v. Weselmann, 49 Super. Ct. (17 J. & S.) 31.

[188] Poole v. Hayes, 17 State Rep. 685, 1 N. Y. Supp. 749.

[189] Charlton v. Rose, 24 App. Div. 485.

[190] Schoonmaker v. Blass, 88 Hun, 179.

[191] Gaylord v. Beardsley, 46 State Rep. 523; Wood v. McGuire, 26 Misc. 200.

[192] Smith v. Rathbun, 75 N. Y. 122; Union Bank v. Mott, 11 Abb. Pr. 42, 19 How. Pr. 267.

[193] Kimbel v. Mason, 61 Hun, 337, 40 State Rep. 646.

[194] Hayes v. Kerr, 39 App. Div. 529; Fink v. Manhattan Ry. Co., 24 Abb. N. C. 81, 18 Civ. Proc. R. (Browne) 141, 15 Daly, 479, 29 State Rep. 153, 8 N. Y. Supp. 327.

[195] Austin v. Wauful, 36 State Rep. 779; Conway v. City of New York, 8 Daly, 306.

Service of amended pleading on the opposing party must be provided for by the order[196] notwithstanding the party has defaulted by not answering the original pleading.[197]

The order authorizing an amended pleading, where the case is on the general calendar of issues of fact, may direct that the case retain the place on such calendar which it occupied before the amendment was allowed, and that the proceedings had on the amended pleading shall not affect the place of the case upon such calendar or render necessary the service of a new notice of trial.[198]

Objections to the order may be waived by acceptance of costs imposed as a condition of allowing the amendment,[199] or by answering over.[200] The order is appealable to the appellate division but the decision of the special term will not be disturbed except for an abuse of discretion.[201] But if a party appeals from an order giving him leave to amend, the right to amend is waived, and will not be renewed or revived by the court.[202] The discretion exercised by a referee in refusing or allowing an amendment cannot be reviewed at special term.[203]

—— **Terms which may be imposed.** An order granting an amendment should so provide that the opposite party be indemnified for all additional expense resulting from such amendment.[204] But there is no governing rule furnished by adjudications which excludes the circumstances of each particular case from consideration in determining what terms are

196 Meyer v. North River Const. Co., 53 Super. Ct. (21 J. & S.) 387.

197 Palmer v. Salisbury, 38 App. Div. 139. See, also, Merrill v. Thompson, 80 App. Div. 503.

198 Code Civ. Proc. § 723, as amended in 1900. Prior to 1900 (L. 1900, p. 1326, c. 591) a provision of this kind in an order was unauthorized, and, although the insertion of such a condition is now discretionary, this necessarily means legal discretion. Lindblad v. Lynde, 81 App. Div. 603.

199 Grattan v. Metropolitan Life Ins. Co., 80 N. Y. 281.

200 Secor v. Law, 22 Super. Ct. (9 Bosw.) 163.

201 Dudley v. Broadway Ins. Co., 42 App. Div. 555.

202 Shibley v. Angle, 37 N. Y. 626.

203 Quimby v. Claflin, 77 N. Y. 270.

204 Union Bank v. Mott, 11 Abb. Pr. 42, 19 How. Pr. 267.

"just."[205] The precise terms to be imposed are in the discretion of the court allowing the amendment[206] which discretion will not ordinarily be disturbed on appeal.[207] Costs may be imposed as a condition notwithstanding the party sues in forma pauperis.[208] An amendment "without costs" is permissible,[209] and proper where the amendment is one merely of form or is one to correct an immaterial variance.[210] But if a motion has been made to set aside a pleading for a defect therein, an amendment without costs is not allowable.[211]

If the amendment is granted before trial, payment of costs to date is usually required if the amendment is one of substance,[212] especially where a new cause of action[213] or defense[214] is thereby introduced. So plaintiff may be compelled as a condition of being permitted an amendment before trial, after reversal on appeal, to pay all the costs of the action to date, including the costs of appeal.[215] And the amending of an answer may be conditioned on the payment of the costs of the action after service of notice of trial, including the costs of a successful appeal by plaintiff, though no costs were imposed on either party on the appeal.[216] So the imposition of all costs after notice of trial as a condition to an amendment of an answer is proper where an entirely new defense is there-

[205] Marsh v. McNair, 40 Hun, 216.

[206] Vibbard v. Roderick, 51 Barb. 616.

[207] Symson v. Selheimer, 105 N. Y. 660.

[208] Coyle v. Third Ave. R. Co., 19 Misc. 345, 77 State Rep. 499.

[209] Cayuga County Bank v. Warden, 6 N. Y. (2 Seld.) 19.

[210] Code Civ. Proc. § 540; McGraw v. Godfrey, 56 N. Y. 610.

[211] Williams v. Wilkinson, 1 Code R., N. S., 20.

[212] Lindblad v. Lynde, 81 App. Div. 603; Wohltman v. Goff, 15 Civ. Proc. R. (Browne) 39; Weeks v. O'Brien, 13 Misc. 503, 68 State Rep. 415, 34 N. Y. Supp. 687.

[213] Frisbie v. Averell, 87 Hun, 217, 67 State Rep. 758.

[214] Bausch v. Ingersoll, 41 State Rep. 581, 16 N. Y. Supp. 336.

[215] Thilemann v. City of New York, 71 App. Div. 595; McEntyre v. Tucker, 40 App. Div. 444; Fox v. Davidson, 40 App. Div. 620, 58 N. Y. Supp. 147; Bates v. Salt Springs Nat. Bank, 43 App. Div. 321. But where, after appeal, defendant interposed a new defense, plaintiff was allowed to amend on payment of merely the costs on appeal. Tooker v. Arnoux, 10 Wkly. Dig. 132.

[216] Rodgers v. Clement, 58 App. Div. 54.

by interposed.[217] But if the amendment merely adds a necessary allegation, without changing the cause of action, all the costs of the action to date should not be imposed but instead only motion costs.[218]

In addition to payment of costs, it is sometimes permissible to impose further conditions such as the filing of an affidavit of merits,[219] the producing a witness for examination,[220] consent to a reduction of the verdict,[221] stipulation to allow plaintiff to discontinue the action without costs if so advised,[222] stipulation that the moving party will apply for a preference at the trial,[223] or where an offer of judgment has been made that the offer may be changed to correspond with the increase in the demand.[224] But where no new cause of action is added by the amendment, a condition that the time of commencing the action be postponed to the date of the amendment, so that the defense of the statute of limitations could be interposed, is unreasonable.[225] The amount claimed as damages in a complaint cannot be increased by amendment, after a verdict for a larger amount, except upon terms of relinquishing the verdict, payment of costs, and consent to a new trial.[226] And after trial, before a referee, leave to amend by adding a new and independent cause of action, should only be granted upon condition that plaintiff stipulate to set aside the report, and vacate the order of reference, with costs to abide event.[227] An order

217 Tribune Ass'n v. Smith, 40 Super. Ct. (8 J. & S.) 99.

218 Minton v. Home Benefit Soc., 16 State Rep. 1001.

219 Haggerty v. Phelan, 46 State Rep. 531, 18 N. Y. Supp. 789.

220 Knauth v. Heller, 68 Hun, 570, 52 State Rep. 764.

221 Lettman v. Ritz, 5 Super. Ct. (3 Sandf.) 734; Debaix v. Lehind, Code R., N. S., 235.

222 Gerdau v. Faber, 26 App. Div. 606.

223 Stemmler v. City of New York, 45 App. Div. 573.

224 Brooks v. Mortimer, 10 App. Div. 518.

225 Critelli v. Rodgers, 87 Hun, 530, 68 State Rep. 651.

226 Corning v. Corning, 6 N. Y. (2 Seld.) 97; Bowman v. Earle, 10 Super. Ct. (3 Duer) 691; Coulter v. American Merchants Union Exp Co., 5 Lans. 67; Pharis v. Gere, 31 Hun, 443. The same rule applies to an action tried without a jury by consent. Decker v. Parsons, 11 Hun, 295.

227 Allaben v. Wakeman, 10 Abb. Pr. 162.

should not absolutely postpone the lien of the movant's judgment but should be optional, i. e., grant the favor on condition of his assenting to the postponement of his lien.[228]

—— Form of order granting leave to amend.

Upon reading and filing the affidavit of ———, plaintiff's attorney herein, verified [date], and a proposed form of an amended complaint hereto annexed, and the order to show cause granted on said affidavit, returnable [date], with proof of due service thereof, and the affidavit of ———, of counsel for defendants, in opposition to the motion made by said order to show cause, and the transcript of the minutes, of the official stenographer of this court, of the proceedings had herein at the equity term of this court, on ———, submitted on the hearing of the motion, and upon all the pleadings and other proceedings herein, and after hearing ——— for the motion made by said order to show cause, and ———, in opposition thereto, it is

Ordered that the complaint herein may be amended by inserting therein after the words ———, in the eighteenth folio, the following allegation: [Insert subject of amendment]; and also by inserting in the said complaint after the words "greatly diminished," in the twentieth folio, the following allegation: [Insert.]

And it is further ordered that within twenty days after the service of a copy of the complaint, amended as aforesaid, upon the attorney for the defendants, the defendants shall serve their amended answer upon the attorney for the plaintiff, and that the issue herein shall remain as of the ——— day of ———.

This order is made conditional upon the payment of ——— dollars by the plaintiff to the defendants.[229]

§ 908. The amended pleading.

A pleading, if amended by leave of court, should conform to the order granting leave to amend.[230] If it does not comply with the order, the pleading should not be returned but instead a motion should be made to strike out.[231] It should ordinarily be an entirely new pleading, but containing the

[228] Symson v. Selheimer, 105 N. Y. 660.

[229] This form is taken from Second Ave. R. Co. v. Metropolitan El. R. Co., 32 State Rep. 97, 58 Super. Ct. (26 J. & S.) 172, 9 N. Y. Supp. 734.

[230] But one having leave of court to amend several defenses in an answer, may serve an amendment setting up one defense only. Decker v. Kitchen, 21 Hun, 332.

[231] Robertson v. Rockland Cemetery Imp. Co., 54 App. Div. 191. See, also, Lange v. Hirsch, 38 App. Div. 176.

same matter as contained in the original pleading, except in so far as the order has permitted a striking out, addition, or change of the allegations. In some cases mere interlineation is allowed but ordinarily this method of amending is not to be commended. If the amendment is one relating to parties, it seems that it is necessary to not only amend the complaint but also the summons.[232] The amendment should be actually inserted in the pleading[233] though it is not necessarily fatal to fail to do so.[234] An amended complaint need not be so designated on its face[235] though an indorsement thereon showing such fact is customary. If a pleading is amended of course within twenty days after service of an order requiring it to be made more definite and certain, it must also conform to the directions of the order.[236]

As a general rule every amended pleading must be served on all the parties to the action who have appeared and are not in default.[237]

—— **Effect of amendments.** An amended pleading, when served, takes the place of the original pleading.[238] It defines the issue to be tried,[239] relates back to the commencement of the suit,[240] defeats motions relating to the original pleading,[241] arrests the running of the statute of limitations as of the day of the filing of the original pleading except when the amend-

[232] Follower v. Laughlin, 12 Abb. Pr. 105.

[233] Livermore v. Bainbridge, 14 Abb. Pr., N. S., 227; Ballou v. Parsons, 11 Hun, 602; Charlton v. Rose, 24 App. Div. 485; Browne v. Stecher Lithographic Co., 24 App. Div. 480.

[234] Maders v. Whallon, 74 Hun, 372, 56 State Rep. 327.

[235] Hurley v. Second Bldg. Ass'n, 15 Abb. Pr. 206, note.

[236] Jeroliman v. Cohen, 8 Super. Ct. (1 Duer) 629.

[237] Dattelbaum v. Tannenbaum, 51 App. Div. 567.

[238] Budd v. Hardenbergh, 36 Misc. 90; Elizabethport Mfg. Co. v. Campbell, 13 Abb. Pr. 86; Kanouse v. Martin, 5 Super. Ct. (3 Sandf.) 593, 8 N. Y. Leg. Obs. 305, 3 Code R. 124.

[239] Thorburn v. Durra, 19 Misc. 70, 76 State Rep. 878.

[240] Colvin v. Shaw, 79 Hun, 56, 61 State Rep. 174.

[241] Spuyten Duyvil Rolling Mill Co. v. Williams, 1 Civ. Proc. R. (McCarty) 280; Rider v. Bates, 66 How. Pr. 129; New York Insulated Wire Co. v. Westinghouse Electric & Mfg. Co., 85 Hun, 269; Burrall v. Moore, 12 Super. Ct. (5 Duer) 654.

ment introduces a new cause of action,[242] and precludes the right of the opposing party to take advantage of admissions in the original pleading.[243] On a complaint being amended in a material particular, the right to answer it is absolute and unrestricted.[244] But where a counterclaim is the same in an original and an amended answer, it is only necessary to serve a reply to the original answer.[245] And service of an amended complaint without leave, after the time to amend of course has expired, is a mere nullity, and failure of the defendant to plead thereto, or irregularity in the defendant's attempted answer, will not authorize the plaintiff to enter judgment.[246] Where an amended pleading is served after service of notice of trial and the filing of a note of issue, a new notice and a new note are necessary.[247] An amendment of a summons and complaint substituting one party for another amounts to a discontinuance of the action as against the party stricken out as a defendant, and the party thus stricken out is no longer before the court.[248] Leave to amend does not, however, sanction the form of the new pleading[249] and it is subject to the same remedies which might have been employed against the original pleading.

[242] Elting v. Dayton, 67 Hun, 425; Davis v. New York, L. E. & W. R. Co., 110 N. Y. 646.

[243] New York Insulated Wire Co. v. Westinghouse Electric & Mfg. Co., 85 Hun, 269, 66 State Rep. 581, 32 N. Y. Supp. 1127.

[244] Harriott v. Wells, 22 Super. Ct. (9 Bosw.) 631; Low v. Graydon, 14 Abb. Pr. 443; James v. Kirkpatrick, 5 How. Pr. 241.

[245] Lamberty v. Roberts, 19 Civ. Proc. R. (Browne) 63, 31 State Rep. 936, 10 N. Y. Supp. 190.

[246] Duval v. Busch, 13 Civ. Proc. R. (Browne) 366.

[247] Ostrander v. Conkey, 20 Hun, 421; Evans v. Olmstead, 31 Misc. 692; Jones v. Seaman, 30 Misc. 65.

[248] United Press v. Abell, 80 N. Y. Supp. 455

[249] Ward v. Barber, 1 E. D. Smith, 424.

CHAPTER VII.

SUPPLEMENTAL PLEADINGS.

§ 909. Common law and equity practice.

At common law, matter of defense arising after issue joined could be set up by a plea known as a plea puis darrein continuance, in bar of the further continuance of the action. In equity a supplemental bill was used to set up new matters arising after the filing of the original bill or the joinder of issue, while matters of defense arising after answer were set up by a cross bill in the nature of a plea puis darrein continuance or in the nature of a supplemental cross-bill.

§ 910. Code rules.

The Code provision relating to supplemental pleadings in general is as follows: "Upon the application of either party, the court may, and, in a proper case, must, upon such terms as are just, permit him to make a supplemental complaint, answer or reply, alleging material facts which occurred after his former pleading, or of which he was ignorant when it was made; including the judgment or decree of a competent court, rendered after the commencement of the action, determining

the matters in controversy, or a part thereof. The party may apply for leave to make a supplemental pleading, either in addition to, or in place of, the former pleading. In the former event, if the application is granted, a provisional remedy, or other proceeding already taken in the action, is not affected by the supplemental pleading; but the right of the adverse party to have it vacated or set aside, depends upon the case presented by the original and supplemental pleadings."[1]

Another Code section provides that where an application is made by a plaintiff to bring in a person as a party defendant on account of a transfer of interest or devolution of liability or the death of a party, the court may direct that a supplemental summons issue and that a supplemental pleading be made.[2] If, in such a case, the application is made by a person in his own behalf, the court may direct that he be made a party, by amendment of the pleadings, "or otherwise," as the case requires.[3] Thus, if plaintiff dies, a motion may be made for an order continuing the action and substituting the executors in the place of their testator, and for leave to serve a supplemental complaint setting forth the facts relating to the devolution of title.[4] If no supplemental answer is served on behalf of the administrator, after such an order is obtained, there can be no recovery in so far as the interest of the administrator is concerned.[5]

And another section provides that where an action is brought by a creditor for the sequestration of the property of a corporation or for its dissolution, and the stockholders, directors, trustees, or other officers, or any of them, are liable by law in any event or contingency for the payment of the debt of plaintiff, the persons so made liable may be made parties defendant by the original or by a supplemental complaint.[6]

[1] Code Civ. Proc. § 544. Section 177 of the old Code was substantially the same as the present Code provision.

[2] Code Civ. Proc. § 760; Mackey v. Duryea, 22 Abb. N. C. 284. See, also, Code Civ. Proc. § 453. See, also, McGean v. Metropolitan El. Ry. Co., 133 N. Y. 9; Wilson v. Lawrence, 8 Hun, 593, 597.

[3] Code Civ. Proc. § 760.

[4] Otten v. Manhattan Ry. Co., 24 App. Div. 130.

[5] Lazarus v. Metropolitan El. Ry. Co., 14 App. Div. 438.

[6] Code Civ. Proc. § 1790.

§ 911. Necessity of supplemental pleading.

In the absence of a supplemental pleading, no evidence can be given or a recovery had as to matters arising after the joinder of issue.[7]

—— **Supplemental as distinguished from amended pleadings.** A supplemental pleading will not be allowed where the same end may be accomplished by an amendment, and hence allegations inadvertently omitted cannot be made the subject of a supplemental pleading.[8] The distinction between an amended and a supplemental pleading is in the time when the matter of the supplemental pleading occurred or came to the knowledge of the pleader. But as time does not affect the substance of a defense, the incorporation in an answer of supplemental matter by way of amendment violates only a technical rule of pleading, and is without effect upon the substantial rights of the parties;[9] and if the parties go to trial on it it should be treated as a supplemental pleading.[10] Another difference is that an amended pleading supersedes the original for the purposes of the issues in the action while ordinarily a supplemental pleading does not take the place of the original but is, as its name indicates, something merely "in addition" to the original pleading.[11]

§ 912. Leave of court—Necessity.

A supplemental pleading cannot be served without leave of court.[12] But if a pleading setting up matters arising after the commencement of the action, has been received and no objection made before or at the trial, it is too late thereafter to

[7] Third Ave. R. Co. v. New York El. R. Co., 19 Abb. N. C. 261; Williams v. Hernon, 16 Abb. Pr. 173; Lawrence v. Church, 128 N. Y. 324.

[8] Pierson v. Cronk, 13 State Rep. 556, 28 Wkly. Dig. 280.

[9] Myers v. Rosenback, 9 Misc. 89; Beck v. Stephani, 9 How. Pr. 193; Hornfager v. Hornfager, 6 How. Pr. 13.

[10] Howard v. Johnston, 82 N. Y. 271.

[11] Myers v. Metropolitan El. R. Co., 19 Civ. Proc. R. (Browne) 448.

[12] Soher v. Fargo, 47 How. Pr. 288, 1 Hun, 312. If served without leave, motion should be made to set pleading aside. Boyle & Everts Co. v. Fox, 72 App. Div. 617, 76 N. Y. Supp. 102.

object that leave of court should have been obtained to set up such defense.[13]

—— **Discretion of court.** Notwithstanding the mandatory language used in the Code, the allowance of a supplemental pleading is in the discretion of the court. It should consider all the circumstances and grant or refuse leave as may be just and proper in the particular case.[14] But if a proper case for serving a supplemental pleading is presented, the granting of the motion is a matter of right.[15] In other words the application must be granted where the grounds of the motion are within the Code rule, unless there is some fact present which calls for the exercise of the court's discretion.[16] For instance, the discretion of the court is to be exercised where it is probable that an injustice would be worked by allowance thereof,[17] or where there is laches in making the motion,[18] in which cases it is proper to refuse to grant the motion. So a supplemental pleading should not be allowed where unnecessary,[19] or where the object can be accomplished by amendment,[20] or where the supplemental matter is irrelevant.[21]

[13] Cass v. Higenbotam, 100 N. Y. 248; Reimer v. Doerge, 61 How. Pr. 142.

[14] O'Brien v. Metropolitan St. Ry. Co., 27 App. Div. 1; Fleischmann v. Bennett, 79 N. Y. 579; Medbury v. Swan, 46 N. Y. 200; Spears v. City of New York, 72 N. Y. 442; Bank of Metropolis v. Lissner, 6 App. Div. 378, 74 State Rep. 764; Giles v. Austin, 46 How. Pr. 269.

[15] Patterson v. Hare, 74 Hun, 269, 56 State Rep. 302.

[16] Hoyt v. Sheldon, 4 Abb. Pr. 59, 13 Super. Ct. (6 Duer) 661.

[17] Bank of Metropolis v. Lissner, 6 App. Div. 378, 74 State Rep. 764; Holyoke v. Adams, 59 N. Y. 233; Haas v. Colton, 12 Misc. 308.

[18] Haas v. Colton, 12 Misc. 308, 67 State Rep. 836; Henderson v. Savage, 46 Super. Ct. (14 J. & S.) 221; Palen v. Bushnell, 18 Civ. Proc. R. (Browne) 56; Morel v. Garelly, 16 Abb. Pr. 269; Medbury v. Swan, 46 N. Y. 200; American Copper Co. v. Lowther, 33 App. Div. 405; Abram French Co. v. Shapiro, 11 Misc. 633, 66 State Rep. 510.

[19] Sage v. Mosher, 17 How. Pr. 367. Thus a supplemental complaint will not be allowed for the purpose of setting up a transfer of the cause of action to plaintiff subsequent to the commencement of the action. Staunton v. Swann, 10 Civ. Proc. R. (Browne) 12.

[20] McMahon v. Allen, 3 Abb. Pr. 89, 1 Hilt. 103.

[21] Cambeis v. McDonald, 2 State Rep. 129; Preservaline Mfg. Co. v. Selling, 75 App. Div. 474.

§ 913. Supplemental complaint.

A supplemental complaint should be allowed where material facts have come to the knowledge of the plaintiff since the service of the complaint or where facts have occurred subsequent to the commencement of the action, which vary[22] the relief to which plaintiff was then entitled;[23] but a new substantive cause of action cannot be set up in a supplemental complaint[24] nor can a fact known to plaintiff at the time of commencing the action.[25] Thus, leave to serve a supplemental complaint in an action for divorce setting up additional acts of adultery since the commencement of the action and joining of issue, cannot be granted.[26] Nor will a supplemental complaint enable plaintiff to recover if the original complaint is fatally defective or does not state a cause of action.[27] Thus a plaintiff will not be permitted by supplemental complaint to set up facts occurring since the commencement of the action, where the facts as they existed at the time the action was brought did not sustain any cause of action in his favor.[28] Nor will a plaintiff, in an action to recover monthly installments of rent be permitted to set up by supplemental com-

[22] Latham v. Richards, 15 Hun, 129; Henschel v. Harlem Reporter Co., 2 Misc. 572.

[23] Peuman v. Slocum, 41 N. Y. 53; New York Cent. & H. R. R. Co. v. Haffen, 23 App. Div. 377; Diehl v. Lambart, 9 Civ. Proc. R. (Browne) 347. Stipulation entered into by all the parties. Harris v. Elliott, 24 App. Div. 133.

[24] Wattson v. Thibou, 17 Abb. Pr. 184; Tiffany v. Bowerman, 2 Hun, 643, 5 Thomp. & C. 169; Bostwick v. Menck, 4 Daly, 68; New England Water Works Co. v. Farmers' Loan & Trust Co., 23 App. Div. 571; Bush v. O'Brien, 53 App. Div. 118; Lindenheim v. New York El. R. Co., 28 App. Div. 170.

[25] Houghton v. Skinner, 5 How. Pr. 420; McMahon v. Allen, 3 Abb. Pr. 89, 1 Hilt. 103.

[26] Campbell v. Campbell, 69 App. Div. 435; Neiberg v. Neiberg, 31 Abb. N. C. 257, 8 Misc. 97, 60 State Rep. 160; Halsted v. Halsted, 7 Misc. 23, 57 State Rep. 79, 27 N. Y. Supp. 408.

[27] McCullough v. Colby, 17 Super. Ct. (4 Bosw.) 603; Holly v. Graf, 29 Hun, 443; Muller v. Earle, 37 Super. Ct. (5 J. & S.) 388.

[28] Farmers' Loan & Trust Co. v. United Lines Telegraph Co., 47 Hun, 315, 14 Civ. Proc. R. (Browne) 187, 14 State Rep. 269, 28 Wkly. Dig. 183; Berford v. New York Iron Mine, 57 Super. Ct. (25 J. & S.) 404, 29 State Rep. 207, 8 N. Y. Supp. 193.

plaint claims arising from the default of the defendant to pay installments falling due after the commencement of the action.[29] And a plaintiff will not be allowed to set up by supplemental complaint an additional cause of action which is barred by the statute of limitations.[30] However, it is no answer to a motion for leave to file a supplemental complaint, that the new facts might furnish the basis of a new action, if they grow out of the original transaction, and are a continuance of it.[31] And new matter may be alleged in aid of the original cause of action, which occurred subsequently to the commencement of the suit.[32]

§ 914. Supplemental answer.

The supplemental answer authorized by the Code is a substitute for the former practice of a plea at law puis darrein continuance, and of a supplemental answer in equity, with this distinction, however, that the supplemental answer does not now ordinarily take the place of the original, but is in addition to it. In an action of a legal nature, a supplemental answer ought always to be allowed whenever a plea puis darrein could have been put in as matter of right under the former practice.[33]

Defendant may be allowed to set up a release,[34] or a settlement,[35] or a discharge in bankruptcy,[36] or a stipulation which may bar the action,[37] or an adjudication in another case, where

[29] Bull v. Rothschild, 16 Civ. Proc. R. (Browne) 356, 22 State Rep. 536, 4 N. Y. Supp. 826.

[30] Miller v. Johnson, 10 Civ. Proc. R. (Browne) 205.

[31] Latham v. Richards, 15 Hun, 129.

[32] Cohn v. Husson, 5 Civ. Proc. R. (Browne) 324.

[33] Holyoke v. Adams, 59 N. Y. 233; Morel v. Garelly, 16 Abb. Pr. 269; Drought v. Curtiss, 8 How. Pr. 56.

[34] Matthews v. Chicopee Mfg. Co., 26 Super. Ct. (3 Rob.) 711; O'Brien v. Metropolitan St. Ry. Co., 27 App. Div. 1.

[35] Christy v. Perkins, 6 Daly, 237; Wood v. Trustees of Northwest Presbyterian Church, 7 Abb. Pr. 210, note.

[36] Lyon v. Isett, 11 Abb. Pr., N. S., 353, 42 How. Pr. 155; Stewart v. Isidor, 5 Abb. Pr., N. S., 68; Hadley v. Boehm, 1 Hun, 304; Hellman v. Licher, 9 Abb. Pr., N. S., 288. But not where granting of motion will work an injustice. Holyoke v. Adams, 59 N. Y. 233.

[37] Purdy v. Manhattan Ry. Co., 11 Misc. 394, 65 State Rep. 450.

relied on in good faith and not merely to obtain delay,[38] or facts occurring after the commencement of an action for specific performance which show that defendants are unable to specifically perform,[39] or proceedings instituted by defendant since the commencement of the action, where the action was based upon the defendant's prior neglect to act,[40] or a reassignment of the property assigned which assignment is sought to be set aside, since the original answer,[41] or matters tending to mitigate plaintiff's damages, of which defendant was ignorant at the time of answering,[42] or a transfer of the cause of action pending suit, whereby maintenance becomes a defense,[43] or a subsequent statute.[44] So a sheriff sued for taking goods under an attachment which he has set up in his answer should be allowed, on such attachment being set aside after issue, to set up other attachments by supplemental answer.[45] But an allegation to the effect that defendant neither had nor has any interest in the litigation, except to pay the money in controversy to the proper claimant, is not the averment of any new or newly-ascertained fact, such as will justify granting an order to serve a supplemental answer.[46]

The express Code provision permitting a party to set up a judgment or decree rendered after the commencement of the action, determining the matters in controversy, or a part

[38] Conried v. Witmark, 73 App. Div. 185; Hendricks v. Decker, 35 Barb. 298; Williams v. Hays, 17 Civ. Proc. R. (Browne) 97, 23 State Rep. 489, 2 Silv. Sup. Ct. 355; Pollmann v. Livingston, 17 App. Div. 528, 79 State Rep. 704, 4 Ann. Cas. 214; Mandeville v. Avery, 44 State Rep. 1; Dempsey v. Baldwin, 15 Misc. 455, 72 State Rep. 178; Jex v. Jacob, 7 Abb. N. C. 452, 19 Hun, 105.

[39] Wilbur v. Gold & Stock Telegraph Co., 52 Super. Ct. (20 J. & S.) 189.

[40] Vanderbeck v. City of Rochester, 46 Hun, 87, 15 State Rep. 148, 27 Wkly. Dig. 397.

[41] Gas Works Const. Co. of Philadelphia v. Standard Gas-Light Co., 47 Hun, 255, 13 State Rep. 339, 13 Civ. Proc. R. (Browne) 405.

[42] Cothran v. Hanover Nat. Bank, 40 Super. Ct. (8 J. & S.) 401.

[43] Hastings v. McKinley, 1 E. D. Smith, 273.

[44] People v. Ulster & D. R. Co., 28 State Rep. 19, 8 N. Y. Supp. 149.

[45] Douglas v. Stockwell, 21 Wkly. Dig. 256.

[46] Reynolds v. Aetna Life Ins. Co., 11 App. Div. 99, 76 State Rep. 2058, 42 N. Y. Supp. 1058.

thereof, applies only to an adjudication upon the same, or some of the same, issues as those involved in the particular suit wherein the supplemental pleading is served, and not an adjudication which merely determines other matters affecting one of the parties.[47] And leave to set up by supplemental answer an adjudication subsequent to the commencement of the action will be refused where it certainly appears that such determination would not constitute a bar to the action, and the defendant will, under the existing pleadings, have a right to offer the record in evidence.[48] And it would seem if two actions based on the same wrong are pending against defendant, he should either plead another action pending or move to consolidate the actions.[49]

§ 915. Supplemental reply.

The Code expressly authorizes a supplemental reply. For instance, payment of a counter-claim set up in the answer, made since service of the answer and the first reply thereto, is properly the subject of a supplemental reply.[50]

§ 916. Application.

The application should be made promptly as soon as the necessity therefor is discovered, by a motion, on notice,[51] at

[47] Continental Const. & Imp. Co. v. Vinal, 14 Civ. Proc. R. (Browne) 293, 15 State Rep. 968, 28 Wkly. Dig. 570, 1 N. Y. Supp. 200.

[48] Avery v. Starbuck, 16 Civ. Proc. R. (Browne) 396, 22 State Rep. 430, 56 Super. Ct. (24 J. & S.) 465; Ratzer v. Ratzer, 2 Abb. N. C. 461; Hasbrouck v. Disbrow, 1 Silv. Sup. Ct. 290, 24 State Rep. 428. Inasmuch as a former adjudication has the same effect when proved as evidence as it would if pleaded, no injustice to defendant can, therefore, be done by the refusal of his motion to be permitted to serve a supplemental answer setting up a judgment recovered in a former action between the same parties. Bank of Metropolis v. Lissner, 6 App. Div. 378, 74 State Rep. 764, 40 N. Y. Supp. 201.

[49] Thus, where plaintiff brought two actions against defendant to recover for personal injuries and for damage to his team injured in the same accident, and recovered in the first action, it was held that while the pendency of either could have been pleaded in the other, or a consolidation could have been effected on motion, the remedy sought was not available by supplemental pleading. McAndrew v. Lake Shore & M. S. Ry. Co., 70 Hun, 46, 53 State Rep. 436.

[50] Ormsbee v. Brown, 50 Barb. 436.

[51] Fleischmann v. Bennett, 79 N. Y. 579. But it has been held that

special term. A supplemental pleading cannot be allowed at the trial[52] and hence it cannot be allowed by a referee.[53] But laches is not necessarily fatal where a good excuse for the delay is shown,[54] and the fact that both parties have noticed the action for trial at special term does not necessarily deprive the court of power to allow a supplemental answer.[55] So it has been held that where the facts sought to be pleaded by supplemental answer amount to an entire satisfaction of the cause of action, it is the duty of the court to allow the motion, whether the application be made at the earliest day or not.[56] And a supplemental complaint may, by special order of the court, be served even after a new trial granted by an appellate court.[57] The motion should not seek leave to serve both an amended and supplemental complaint since such an order cannot be granted.[58] This motion should be supported by affidavits showing when the facts were discovered,[59] and a copy of the proposed pleading should be attached to the motion papers.[60] The scope of the inquiry, on the hearing of the motion, does not extend to determining whether the new facts tend to make out a cause of action[61] or are true[62]

notice is unnecessary (Fisk v. Albany & S. R. Co., 8 Abb. Pr., N. S., 309), especially where the supplemental pleading is for the purpose of bringing in a new party. Ebbets v. Martine, 19 Hun, 294.

[52] Garner v. Hannah, 13 Super. Ct. (6 Duer) 262.

[53] Lyon v. Isett, 34 Super. Ct. (2 J. & S.) 41, 47.

[54] City of New York v. East Bay Land & Imp. Co., 41 App. Div. 537, Hoyt v. Sheldon, 4 Abb. Pr. 59, 13 Super. Ct. (6 Duer) 661.

[55] Blanc v. Blanc, 67 Hun, 384, 51 State Rep. 822, 23 Civ. Proc. R. (Browne) 101, 22 N. Y. Supp. 264.

[56] Drought v. Curtiss, 8 How. Pr. 56.

[57] Getty v. Spaulding, 1 Hun, 115, 3 Thomp. & C. 174.

[58] Oelberman v. New York & N. R. Co., 31 Abb. N. C. 256, 61 State Rep. 615, 29 N. Y. Supp. 864.

[59] Reynolds v. Aetna Life Ins. Co., 16 App. Div. 74, 78 State Rep. 591.

[60] Stokes v. Manhattan Ry. Co., 47 App. Div. 58; Newell v. Newell, 27 Misc. 117; Diehl v. Beck, 61 App. Div. 570. However, a motion to set up a fact by supplemental complaint will be granted notwithstanding failure of the plaintiff to serve a copy of the proposed pleading with the motion papers, where the facts sought to be set up fully appear. Diehl v. Lambart, 9 Civ. Proc. R. (Browne) 347.

[61] Latham v. Richards, 15 Hun, 129.

[62] Cornwall v. Cornwall, 30 Hun, 573.

or constitute a defense,[63] unless the proposed pleading is clearly bad or frivolous,[64] since the granting of the leave determines nothing as to the party's rights in the action.[65]

§ 917. Order.

The order must be specific and not give a general authority to serve a supplemental pleading setting up any new matter that may thereafter occur in the action.[66] It usually fixes a time within which the supplemental pleading must be filed and grants twenty days to answer the supplemental pleading.[67] Upon allowing service of a supplemental answer, the order may properly give plaintiffs in the suit leave to serve an amended or supplemental complaint, with the privilege to defendants of answering thereto.[68]

The order may impose "such terms as are just" such as the payment of costs to date and permission to the opposing party to discontinue without costs.[69] So it may impose, as a condition, that defendant waive other defenses, and this should be done where the sufficiency and equity of the proposed defense is doubtful.[70] It may also provide that a new notice of trial need not be served, or a new note of issue

[63] Reynolds v. Aetna Life Ins. Co., 16 App. Div. 74, 78 State Rep. 591; Mitchell v. Allen, 25 Hun, 543; Tifft v. Bloomberg, 49 Super. Ct. (17 J. & S.) 323. So held where judgment was set up as a bar. Bate v. Fellowes, 17 Super. Ct. (4 Bosw.) 638.

[64] Gerstein v. Fisher, 12 Misc. 211, 67 State Rep. 824; Morel v. Garelly, 16 Abb. Pr. 269; Jagger v. Littlefield, 3 Wkly. Dig. 316.

[65] Robbins v. Wells, 18 Abb. Pr. 191, 26 How. Pr. 15, 24 Super. Ct. (1 Rob.) 666.

[66] Stransky v. Harris, 22 Misc. 691.

[67] Granting twenty days to "answer," does not deprive the party of the right to demur. Myers v. Metropolitan El. R. Co., 16 Daly, 410, 34 State Rep. 293, 19 Civ. Proc. R. (Browne) 448, 12 N. Y. Supp. 2.

[68] Brown v. May, 17 Abb. N. C. 208.

[69] Preservaline Mfg. Co. v. Selling, 75 App. Div. 474; Richardson & Morgan Co. v. Gudewill, 37 Misc. 858; Julio v. Equitable Life Assur. Soc., 2 City Ct. R. 301; Rosenfield v. Shebel, 1 Month. Law Bul. 4; Core v. Ford, 1 Month. Law Bul. 12. In Pollmann v. Livingston, 17 App. Div. 528, costs of reference were imposed. But in Haffey v. Lynch, 46 App. Div. 160, the court refused to require payment of all the costs accrued where application was made after reversal on appeal.

[70] Bate v. Fellowes, 17 Super. Ct. (4 Bosw.) 638.

filed.[71] But the special term upon granting leave to serve a supplemental complaint in an equitable action pending before a referee should not leave it to the referee to fix the terms upon which such supplemental complaint will be allowed, as such referee has no power to impose costs of a motion made at a special term.[72]

§ 918. Contents of supplemental pleading.

A supplemental pleading, where merely "in addition to" the original pleading, should state "material" facts and show that they occurred after his former pleading or that he had no knowledge of them at such time.[73] It may set up new matter but not, if a complaint, a new cause of action.[74] It need not repeat the allegations of the original pleading[75] unless it is to take the place thereof, as required by the order. It must be consistent with and not contradict any allegations of the original pleading,[76] and must conform to the order granting leave to serve such a pleading. If it does not come within the terms of such order, it is proper practice to return the pleading with a notice of the objections thereto.[77] It would seem that a supplemental pleading should be verified if the original is verified.

—— **Amendments.** A supplemental pleading is amendable the same as other pleadings and hence may be amended once as of course within twenty days.[78]

§ 919. Proceedings in cause after supplemental pleading.

Leave is usually granted to answer the supplemental pleading but the answer must be limited to the matters set up in

[71] Myers v. Metropolitan El. R. Co., 16 Daly, 410, 34 State Rep. 293, 19 Civ. Proc. R. (Browne) 448, 12 N. Y. Supp. 2.

[72] Staunton v. Swann, 10 Civ. Proc. R. (Browne) 12.

[73] McRoberts v. Pooley, 1 State Rep. 725. So held in equity before the Codes. Harrington v. Slade, 22 Barb. 161. That facts must be material, see Bowery Nat. Bank v. Duryee, 74 N. Y. 491.

[74] Lindenheim v. New York El. R. Co., 28 App. Div. 170.

[75] Robbins v. Wells, 18 Abb. Pr. 191.

[76] Wattson v. Thibou, 17 Abb. Pr. 184; Tiffany v. Bowerman, 2 Hun, 643, 5 Thomp. & C. 169; Buchanan v. Comstock, 57 Barb. 582.

[77] Otten v. Manhattan Ry. Co., 24 App. Div. 130.

[78] Divine v. Duncan, 2 Abb. N. C. 328, 52 How. Pr. 446.

such supplemental pleading.[79] Thus, if the supplemental complaint is to bring in a new party, the only matters he can put in issue are those showing the transmission of interest from the original party.[80] There is some doubt as to whether a supplemental pleading may be demurred to in any case[81] but the rule supported by the better reasoning seems to be that if the supplemental pleading is "in addition to," and not "in place of," the former pleading, it is not demurrable,[82] though otherwise where the supplemental pleading is filed in lieu of the original pleading.[83]

The rule under the old Code that a supplemental pleading was not a substitute for the original,[84] is modified by the present Code provision that "the party may apply for leave to make a supplemental pleading, either in addition to, or in place of, the former pleading."[85] If the application is for leave to make a supplemental pleading "in addition" to the former pleading, the granting of the application does not affect a provisional remedy or other proceeding already taken in the action; but the right of the adverse party to have it vacated or set aside depends on the case presented by the original and supplemental pleadings.[86] If the supplemental pleading is in addition to the original pleading, the issues joined under the original pleadings remain as do such pleadings themselves.

[79] Dann v. Baker, 12 How. Pr. 521.

[80] Forbes v. Waller, 25 N. Y. 430.

[81] Cases holding pleading demurrable: Goddard v. Benson, 15 Abb. Pr. 191. Contra,—Fleischman v. Bennett, 1 Month. Law Bul. 43; Myers v. Metropolitan El. R. Co., 19 Civ. Proc. R. (Browne) 448.

[82] See dissenting opinion of Judge Ingraham in Harris v. Elliott, 29 App. Div. 568. Where it is "in addition" to the original pleading, a demurrer will not be sustained if the two together state facts sufficient for a cause of action. Hayward v. Hood, 44 Hun, 128, 8 State Rep. 457; McRoberts v. Pooley, 1 State Rep. 725.

[83] Stearns v. Lichtenstein, 48 App. Div. 498.

[84] Dann v. Baker, 12 How. Pr. 521; Slauson v. Englehart, 34 Barb. 198. But the court might, as a condition of granting the motion, require the supplemental pleading to be substituted in place of the original. Brown v. Richardson, 27 Super. Ct. (4 Rob.) 603.

[85] Code Civ. Proc. § 544.

[86] Code Civ. Proc. § 544.

The original and the supplemental pleadings are to be construed as one pleading.

Form of supplemental answer.

Now comes the ——— by its attorneys, by leave of court first obtained, and files this, its supplemental answer, and avers and shows that on the ——— day of ———, and since the filing of the ——— in this action, the plaintiff has made and delivered to this defendant, for a valuable consideration, a full release, discharge, and satisfaction of all claims and demands, of every name and kind, between this plaintiff and the defendant. Wherefore, defendant prays that this action be dismissed.

CHAPTER VIII.

MOTIONS RELATING TO PLEADINGS.

§ 920. Remedies for defective pleading.

As has already been stated, if a pleading is insufficient in law, the opposing party should demur thereto. But if a pleading is defective, though not subject to a demurrer, a motion may usually be made to compel a correction or to strike out the pleading or to obtain a judgment on the pleadings. The Code remedies by motion may be classified as follows:

1. Pleading indefinite and uncertain,—motion to make definite and certain.[1]

[1] Code Civ. Proc. § 546.

2. Irrelevant, redundant or scandalous matter in a pleading,—motion to strike out such matter.[2]

3. Frivolous pleading,—motion for judgment on the pleadings.[3]

4. Sham answer,—motion to strike out the answer as sham.[4]

§ 921. Indefinite and uncertain allegations in pleading.

A pleading may be required, by amendment, to be made more definite and certain where one or more denials or allegations therein are so indefinite or uncertain that the precise meaning or application thereof is not apparent.[5] If the objection is not so taken, it cannot be first urged on the trial,[6] since answering over waives the right to object to a pleading as indefinite or uncertain.[7] The motion is a substitute for a special demurrer,[8] and hence relates merely to form, so that failure to state sufficient facts to show a cause of action cannot be reached by such a motion.[9] Whether a pleading is sufficiently definite and certain has already been considered.[10] The motion will not be granted to obtain the evidence on which defendant relies to support his denials,[11] nor where the allegations objected to as indefinite are mere surplusage.[12] And the answer will not be compelled to be made more definite than the complaint in so far as it relates to the same matter.[13] But if there is any doubt as to which cause of action plaintiff intends to rely on, the remedy is to make the complaint more definite and certain.[14] It is no defense to the

[2] Code Civ. Proc. § 545.
[3] Code Civ. Proc. § 537.
[4] Code Civ. Proc. § 538.
[5] Code Civ. Proc. § 546; Cheney v. Fisk, 22 How. Pr. 236.
[6] Greenfield v. Massachusetts Mut. Life Ins. Co., 47 N. Y. 430; Seeley v. Engell, 13 N. Y. (3 Kern.) 542; Callanan v. Gilman. 107 N. Y. 360.
[7] White v. Rodemann, 44 App. Div. 503.
[8] Kellogg v. Baker, 15 Abb. Pr. 286.
[9] Culver v. Hollister, 17 Abb. Pr. 405.
[10] See ante, §§ 797-799.
[11] White v. Koster, 89 Hun, 483.
[12] Davidson v. Seligman, 51 Super. Ct. (19 J. & S.) 47.
[13] Eisner v. Eisner, 89 Hun, 480.
[14] Commercial Bank of Keokuk v. Pfeiffer, 22 Hun, 327.

motion that the moving party has knowledge of all the facts by reason of another action[15] or that the pleading contains other sufficient allegations,[16] but it has been held that where the parties are possessed of equal information, the motion should be refused.[17] Denials have been required to be made more definite[18] though it has been held that where a denial is clearly insufficient the motion should not be to make more definite but for judgment on the pleadings on the ground of frivolousness.[19] A reply may be ordered to be made more definite.[20] On a motion to make the complaint more definite and certain the causes of action therein may be required to be so stated as each to be complete of itself.[21]

It is sometimes difficult to determine whether the remedy is a motion for a bill of particulars or to make more definite and certain, notwithstanding the distinction that the one remedy is proper where the statement involves details while the other is proper only where "the precise meaning or application" of the pleading is not apparent.[22] In such a case it is common practice to move for relief in the alternative.[23] Whether the motion will be granted where a bill of particulars is moved for and granted, as to the same matters, seems to depend on whether the latter takes the place of the former.[24]

The motion must be noticed before demurring or answering the pleading and within twenty days from the service there-

[15] Ottman v. Fletcher, 23 Abb. N. C. 430.

[16] People v. New York Juvenile Guardian Soc., 6 Wkly. Dig. 136.

[17] Cook v. Matteson, 19 Civ. Proc. R. (Browne) 321.

[18] Mattison v. Smith, 24 Super. Ct. (1 Rob.) 706; Farnsworth v. Wilson, 5 Civ. Proc. R. (Browne) 179, note. See, also, Burley v. German-American Bank, 5 Civ. Proc. R. (Browne) 172, 178. So have negatives pregnant. Armstrong v. Danahy, 75 Hun, 405, 56 State Rep. 743; Elton v. Markham, 20 Barb. 343.

[19] Kelly v. Sammis, 25 Misc. 6.

[20] Risley v. Carll, 1 Month. Law Bul. 52.

[21] Wallace v. Jones, 68 App. Div. 191.

[22] Rouget v. Haight, 57 Hun, 119.

[23] Singer v. Weber, 44 App. Div. 134.

[24] Lahey v. Kortright, 55 Super. Ct. (23 J. & S.) 156, 13 Civ. Proc. R. (Browne) 352. See, also, Ross v. Hamlin, 36 State Rep. 609.

of.[25] The time to make such motion cannot be extended unless notice of an application for such extension, stating the time and place thereof, of at least two days shall be given to the adverse party.[26] But it seems that an order to show cause why the complaint should not be corrected may be made as part of an order extending the time to answer,[27] and where the time "to plead or otherwise move" has been extended, the motion may be made at any time before the expiration of such extension.[28] The motion to make more definite and certain often seeks additional relief such as a separate statement of the causes of action set forth in the complaint or the striking out of certain matter in the pleading.[29] The notice of motion should specifically state wherein the complaint is deficient and what further facts are desired.[30] The motion must be decided by an examination of the pleading and not by a reference to ascertain facts.[31] The motion should be determined before the determination of a motion for a receiver.[32] An order requiring a pleading to be made more definite and certain should fix the time within which the amended pleading must be served on the opposing attorney, provide that in default of service and payment of specified costs that the pleading be stricken out, and may also extend the time to answer, reply, demur, or move for a specified number of days after service of the amended complaint, and contain a stay of proceedings. But it should not as an alternative direct the answer to be stricken out where the objectionable phrases may be stricken out without making the pleading defective.[33] Nor

[25] Rule 22 of General Rules of Practice; Brooks v. Hanchett, 36 Hun, 70; De Carrillo v. Carrillo, 53 Hun, 359; Huber v. Wilson, 33 State Rep. 849; Gridley v. Gridley, 7 Civ. Proc. R. (Browne) 215.

[26] Rule 22 of General Rules of Practice.

[27] McDonald v. Green, 28 Misc. 55.

[28] Hammond v. Earle, 5 Abb. N. C. 105. But not where the order extending time to answer or demur does not reserve right to move. Brooks v. Hanchett, 36 Hun, 70.

[29] White v. Koster, 89 Hun, 483.

[30] Rathbun v. Markham, 43 How. Pr. 271.

[31] Hopkins v. Hopkins, 28 Hun, 436.

[32] People v. Manhattan R. Co., 9 Abb. N. C. 448.

[33] Cooper v. Fiske, 44 App. Div. 531.

should the order give the moving party leave, in case of a failure to amend, to apply for judgment.[34] Failure to comply with the order warrants the exclusion of evidence as to the indefinite allegations ordered to be made more definite.[35]

§ 922. Irrelevant, redundant or scandalous matter.

The Code provides that irrelevant, redundant or scandalous matter contained in a pleading, may be stricken out, on the motion of a person aggrieved thereby.[36] But striking out irrelevant and redundant allegations is not an absolute right, and the discretionary power to do so will be sparingly exercised especially in an equity cause.[37] The motion should be granted only where no doubt exists as to the irrelevancy charged.[38] And the nonappearance of defendant at the hearing of plaintiff's motion to strike out portions of the answer as redundant does not entitle him to have the motion granted as matter of course.[39] If no motion is made, the objection cannot be urged at the trial.[40]

This Code provision does not, however, authorize an entire answer, or reply, or defense therein, to be stricken out on the ground of irrelevancy or redundancy[41] inasmuch as a demurrer lies in such a case on the ground of insufficiency,[42] though if the pleading is scandalous it is not demurrable and hence may be stricken out in toto.[43]

[34] Hughes v. Chicago, M. & St. P. Ry. Co., 45 Super. Ct. (13 J. & S.) 114.

[35] Lynch v. Walsh, 9 State Rep. 520, 11 Civ. Proc. R. (Browne) 446.

[36] Code Civ. Proc. § 545. What constitutes irrelevant, redundant or scandalous matter, see ante, § 794.

[37] Deering v. Schreyer, 25 Misc. 618; John D. Park & Sons Co. v. National Wholesale Druggists' Ass'n, 30 App. Div. 508.

[38] Town of Essex v. New York & C. R. Co., 8 Hun, 361; Bradstreet v. Bradstreet, 14 State Rep. 260; Williams v. Folsom, 57 Hun, 128, 32 State Rep. 455; Anonymous, 4 Super. Ct. (2 Sandf.) 682.

[39] Homan v. Byrne, 14 Wkly. Dig. 175.

[40] Smith v. Countryman, 30 N. Y. 655.

[41] Cardeza v. Osborn, 32 Misc. 46; Goodman v. Robb, 41 Hun, 605; Fasnacht v. Stehn, 53 Barb. 650.

[42] Walter v. Fowler, 85 N. Y. 621. The purpose of the motion is not to test the validity of a defense. Morgan v. Bennett, 44 App. Div. 323; Smith v. American Turquoise Co., 77 Hun, 192, 59 State Rep. 830.

[43] Armstrong v. Phillips, 60 Hun, 243.

It will be noticed that the Code says that irrelevant, etc., matter may be stricken out on the motion of a "person aggrieved thereby."[44] Hence the mere fact that matter is irrelevant or redundant is not sufficient to authorize its being stricken out, but in addition it must appear on the face of the pleading that harm or injustice will be done the moving party if it is allowed to remain in the pleading,[45] as where there is danger that false issues will be raised,[46] or the irrelevant or redundant matter is such that a reply is thereby rendered necessary.[47] But a party is not sufficiently "aggrieved" for the purpose of moving to strike irrelevant matter from an answer, merely because costs to abide the event had been imposed on him by the decision denying the motion from which his appeal was taken.[48] Nor is a plaintiff aggrieved where a defense sets up facts provable under denials contained in the answer.[49] The person against whom charges of a criminal nature are made in a pleading, is always considered aggrieved by them.[50] The person "aggrieved" need not be a party.[51]

Allegations which are merely statements of evidence may be stricken out[52] as may matter in an answer which should have been raised by demurrer;[53] but allegations which may bear on the question of costs should not be stricken out,[54] nor should

[44] Bogardus v. Metropolitan St. Ry. Co., 62 App. Div. 376; Rank v. Grote, 49 Super. Ct. (17 J. & S.) 502.

[45] Stokes v. Star Co., 69 App. Div. 21; Howard v. Mobile Co. of America, 75 App. Div. 23; Nordlinger v. McKim, 38 State Rep. 886; Duprat v. Havemeyer, 18 Wkly. Dig. 439; Lugar v. Byrnes, 15 Civ. Proc. R. (Browne) 72, 15 State Rep. 970; Williams v. Folsom, 57 Hun, 128, 32 State Rep. 455, 10 N. Y. Supp. 895.

[46] Steiffel v. Tolhurst, 32 Misc. 469.

[47] Tradesmen's Nat. Bank v. United States Trust Co., 49 App. Div. 362.

[48] Baer v. Seymour, 12 State Rep. 166.

[49] Hollenbeck v. Clow, 9 How. Pr. 289.

[50] Hilton v. Carr, 40 App. Div. 490.

[51] He may be plaintiff's attorney. Wehle v. Loewy, 50 State Rep. 760, 2 Misc. 345, 21 N. Y. Supp. 1027.

[52] Schroeder v. Young, 49 App. Div. 640, 63 N. Y. Supp. 110.

[53] Dennison v. Dennison, 9 How. Pr. 246.

[54] Town of Dunkirk v. Lake Shore & M. S. Ry. Co., 75 Hun, 366, 56 State Rep. 767, 27 N. Y. Supp. 105.

the prayer for relief,[55] or an allegation in the complaint material as to one of defendants though immaterial as against the other defendant,[56] or allegations which relate only to a co-party.[57] So improper joinder of causes of action is not ground of motion to strike out the allegations concerning one of them.[58] And a whole paragraph in a pleading will not be stricken out where part of it is good.[59] And the fact that an answer to the allegations might subject the party to a criminal prosecution is not ground for striking out such allegations.[60] The fact that the allegations left after striking out the objectionable matter, standing alone, will be demurrable, is not ground for refusing the motion;[61] but if redundant or irrelevant matter in a pleading is such that to strike it out would leave the pleading an unintelligible fragment, raising no issue, the proper remedy is not a motion to strike out, but a motion for judgment on account of its frivolousness.[62] The right of one defendant to strike out on motion affirmative allegations and prayer for relief from the answer of a co-defendant depends upon the departure of the allegations from the domain of controversy drawn by the lines of the complaint.[63]

—— **Motion and order.** The motion must be noticed before demurring or answering the pleading, and within twenty days from the service thereof.[64] And the time to make the motion

[55] Smith v. Hilton, 50 Hun, 236, 19 State Rep. 340; Averill v. Taylor, 5 How. Pr. 476, Code R., N. S., 213.

[56] Hoffman v. Wight, 137 N. Y. 621; Hagerty v. Andrews, 94 N. Y. 195.

[57] People v. New York Cent. U. G. Ry. Co., 39 State Rep. 571.

[58] Gilbert v. Warren, 44 App. Div. 631, 60 N. Y. Supp. 456.

[59] Raines v. New York Press Co., 92 Hun, 515, 72 State Rep. 197.

[60] Davenport Glucose Mfg. Co. v. Taussig, 31 Hun, 563.

[61] Waller v. Raskan, 12 How. Pr. 28. See, also, McGregor v. McGregor, 35 How. Pr. 385.

[62] Lane v. Gilbert, 9 How. Pr. 150.

[63] Stibbard v. Jay, 26 Misc. 260, 29 Civ. Proc. R. (Kerr) 22.

[64] Rule 22 of General Rules of Practice; Siriani v. Deutsch, 12 Misc. 213, 67 State Rep. 892; Williams v. Folsom, 57 Hun, 128, 32 State Rep. 455; Smith v. Countryman, 30 N. Y. 655; New York Ice Co. v. Northwestern Ins. Co., 12 Abb. Pr. 74, 21 How. Pr. 234. The retention of the notice of motion does not waive this requirement. Gibson v. Gibson, 68 Hun, 381.

cannot be extended unless at least two days notice of the application therefor, stating the time and place thereof, be given the adverse party.[65] The notice of motion must specify the precise parts which are to be stricken out and it is common practice to identify the matter by referring to the paragraph and by setting forth the objectionable part together with the words immediately preceding and immediately following.[66] Procuring an order, extending time to answer, is a waiver of the right to move to strike out irrelevant matter, unless the right to make the motion is given by the order.[67] And an answer, served after notice of motion to strike out irrelevant matter in the complaint, waives the motion.[68]

The motion should be determined on an inspection of the pleadings.[69] The sufficiency of a defense cannot be determined if there is a semblance of a defense.[70] And the constitutionality of a law ought not be called in question.[71] The order may sustain the motion in part and deny it in part.[72] It may also permit an amendment of the pleading.[73] If a considerable portion of an answer is stricken out, the order should require service of the reformed pleading.[74] If scandalous matter is stricken out, the attorney whose name is subscribed to the pleading may be directed to pay the costs of the motion, and his failure to pay them may be punished as a contempt of court.[75] If the notice of motion contains the general prayer for relief, a whole defense or answer may be struck out as sham.[76]

[65] Rule 22 of General Rules of Practice.

[66] Blake v. Eldred, 18 How. Pr. 240.

[67] Brooks v. Hanchett, 36 Hun, 70; Isham v. Williamson, 7 N. Y. Leg. Obs. 340; Bowman v. Sheldon, 7 Super. Ct. (5 Sandf.) 657.

[68] Goch v. Marsh, 8 How. Pr. 439.

[69] Affidavits are improper. Stewart v. Forst, 15 Misc. 621, 72 State Rep. 795, 37 N. Y. Supp. 215.

[70] Steiffel v. Tolhurst, 32 Misc. 469.

[71] Brien v. Clay, 1 E. D. Smith, 649.

[72] De Santes v. Searle, 11 How. Pr. 477.

[73] Seligman v. Schmidt, 3 Misc. 630, 52 State Rep. 520.

[74] Waltham Mfg. Co. v. Brady, 67 App. Div. 102.

[75] Code Civ. Proc. § 545; McVey v. Cantrell, 8 Hun, 522.

[76] Blake v. Eldred, 18 How. Pr. 240. See, also, Littlejohn v. Greeley, 13 Abb. Pr. 311, 22 How. Pr. 345.

§ 923. Frivolous pleadings.

If a demurrer, answer, or reply is frivolous, the party prejudiced thereby, may apply for judgment on the pleadings.[77] But this remedy is only available when the pleading, as a whole, is frivolous. That one of several defenses is frivolous does not warrant a judgment on the pleadings.[78]

—— **Remedy.** A frivolous answer or reply may, if the party prefer, be demurred to as insufficient.[79] But the distinction between a motion for judgment because of frivolousness and the question presented on demurrer must not be lost sight of. The one is a summary way of getting rid of the pleading on motion, and the other is the orderly manner of proceeding "by argument" to try the issue of law.[80] That a pleading would be insufficient on demurrer does not necessarily make it frivolous.[81]

—— **Definition and nature.** A frivolous pleading is one which, assuming the truth of its contents, is so clearly and palpably bad as to require no argument to convince the court that it presents nothing worthy of adjudication in the due course of legal proceedings, and which would be pronounced by the court indicative of bad faith in the pleader on a mere inspection.[82] And whenever it is necessary, before awarding judgment, to examine all the pleadings, it is not proper to grant a motion for judgment on account of the frivolousness of the last pleading.[83] A frivolous "answer" is one that

[77] Code Civ. Proc. § 537.

[78] Thompson v. Erie R. Co., 45 N. Y. 468; Strong v. Sproul, 53 N. Y. 497; Thompson v. Griswold, 11 Wkly. Dig. 180; Reese v. Walworth, 61 App. Div. 64; Munger v. Shannon, 61 N. Y. 251; Siriani v. Deutsch, 12 Misc. 213.

[79] Goodman v. Robb, 41 Hun, 605.

[80] Bedlow v. Stillwell, 45 App. Div. 557.

[81] Dancel v. Goodyear Shoe Machinery Co., 67 App. Div. 498; Youngs v. Kent, 46 N. Y. 672; Aitken v. Clark, 15 Abb. Pr. 319.

[82] Strong v. Sproul, 53 N. Y. 497; Smith v. Mead, 14 Abb. Pr. 262; Crucible Co. v. Steel Works, 9 Abb. Pr., N. S., 195, 57 Barb. 447; Robbins v. Palmer, 5 Wkly. Dig. 537; Merritt v. Gouley, 58 Hun, 372, 35 State Rep. 277, 20 Civ. Proc. R. (Browne) 43; Henriques v. Garson, 26 App. Div. 38.

[83] Henriques v. Trowbridge, 27 App. Div. 18.

shows no defense, conceding all that it alleges to be true.[84] An answer is frivolous where it raises no issue on any fact which the plaintiff must prove.[85] But an answer must be tested by the complaint, and if it puts in issue the material allegations as to the defendant who serves it, it is not frivolous.[86] And a pleading is not frivolous merely because it is vague.[87] It is not the motive with which an answer is put in, or its truth or falsity, that is the test.[88] An answer cannot be stricken out as frivolous merely because it does not state that it is an answer to the amended complaint.[89]

——**Denials.** An answer or reply consisting of a denial is sometimes adjudged frivolous, as where the denials of the answer go to portions of the complaint not necessary to sustain the action,[90] or where an answer by three of four defendants, all of whom are sued as co-partners, denies a sale to the three answering.[91] But if a denial raises a material issue, the pleading is not frivolous.[92] And an answer is not frivolous which denies a fact not directly averred in the complaint,[93] or merely because it denies the several allegations of the complaint conjunctively and not disjunctively.[94] So while it may be quite apparent that a pleading is interposed to gain time, a denial of a material allegation of the complaint will not be held frivolous on such ground.[95] So a reply which denies aver-

[84] Brown v. Jenison, Code R., N. S., 156, 5 Super. Ct. (3 Sandf.) 732; Hull v. Smith, 8 Super. Ct. (1 Duer) 649, 8 How. Pr. 149.

[85] Gruenstein v. Jablonsky, 1 App. Div. 580; Trumbull v. Ashley, 26 App. Div. 356.

[86] West End Sav. & Loan Ass'n v. Niver, 4 App. Div. 618, 39 N. Y. Supp. 414.

[87] Kelly v. Barnett, 16 How. Pr. 135.

[88] Hecker v. Mitchell, 5 Abb. Pr. 453, 13 Super. Ct. (6 Duer) 687.

[89] Donovan v. Main, 74 App. Div. 44.

[90] People v. Dispensary & Hospital Soc. of Woman's Inst., 7 Lans. 304.

[91] Platt & Washburn Refining Co. v. Hepworth, 13 Civ. Proc. R. (Browne) 122.

[92] Robert Gere Bank v. Inman, 51 Hun, 97; Davis v. Potter, 4 How. Pr. 155, 2 Code R. 99; Temple v. Murray, 6 How. Pr. 329.

[93] Lord v. Chesebrough, 6 Super. Ct. (4 Sandf.) 696, Code R., N. S., 322.

[94] Livingston v. Hammer, 20 Super. Ct. (7 Bosw.) 670.

[95] Hill v. Warner, 39 App. Div. 424.

ments in the answer, material to pleading a counterclaim, cannot be stricken out as frivolous.[96] And a general or specific denial of any knowledge or information sufficient to form a belief, cannot be struck out as frivolous,[97] though the allegations thus denied are presumptively within defendant's personal knowledge.[98]

—— **Counterclaim and reply.** The pleading which may be adjudged frivolous must, however, be one which is in reply to a pleading seeking affirmative relief and hence it would seem that a reply to a mere defense of new matter, when ordered by the court, is not the subject of a motion for judgment because of frivolousness, though the rule is otherwise where the reply is necessary without an order i. e., where it answers a counterclaim.[99] And in pursuance of this reasoning judgment cannot be rendered on the ground that a counterclaim is frivolous.[100]

—— **Frivolous demurrer.** A demurrer may be frivolous and judgment thereon may be moved for,[101] as where a demurrer is interposed which the pleader could not have supposed would dispose of the case on the merits;[102] but if the demurrer is based on a doubtful question of law it is not frivolous,[103] though if the pleading demurred to is sustained by reported cases, a demurrer to it must be treated as frivolous.[104] A demurrer is not frivolous unless clearly bad on its face[105] and

[96] Wood v. City of New York, 3 Abb. Pr., N. S., 467.

[97] Barrie v. Yorston, 35 App. Div. 404, 28 Civ. Proc. R. (Kerr) 253; Sheldon v. Heaton, 78 Hun, 50, 60 State Rep. 818.

[98] Stockton v. Kenney, 24 Misc. 300; Leach v. Boynton, 3 Abb. Pr. 1.

[99] Henriques v. Trowbridge, 27 App. Div. 18.

[100] Fettretch v. McKay, 47 N. Y. 426; Cooper v. Howe, 16 Hun, 502.

[101] Kain v. Dickel, 46 How. Pr. 208; Kirkbride v. Wilgus, 37 Misc. 519.

[102] Osgood v. Whittelsey, 10 Abb. Pr. 134, 20 How. Pr. 72.

[103] Chauncey v. Lawrence, 15 Abb. Pr. 106.

[104] Lattimer v. New York Metallic Spring Co., 9 Abb. Pr. 207, note; Phelps v. Ferguson, 9 Abb. Pr. 206; 19 How. Pr. 143.

But it has been held that if principle of a decision in point, is questionable, the demurrer is not frivolous. Bank of Wilmington v. Barnes, 4 Abb. Pr. 226; People v. McCumber, 27 Barb. 632, 15 How. Pr. 186.

[105] Hopper v. Erslev, 3 Misc. 340, 52 State Rep. 8; Leavy v. Leavy, 22 Hun, 499.

its insufficiency is so clear as to appear from a mere statement without argument.[106] And it is questionable whether a demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action, in the form specifically authorized by the Code, may ever be considered frivolous.[107]

——**Motion and order.** The application may be made to the court or to a judge of the court, but must be on notice to the adverse party of not less than five days.[108] A motion to make more definite and certain need not be first made.[109] The motion may be made before the opposing party's time to serve an amended pleading as of course has expired,[110] but if within the twenty days allowed for amending, the party so amend that the pleading is no longer frivolous, the motion will be denied without costs.[111] Neither the Code nor the General Rules of Practice prescribe any time within which the motion must be made; but it seems that the rule which makes a notice of trial a bar to a motion to make a pleading more definite does not apply to a motion for judgment on the pleadings,[112] and the right to move is not waived by answering the frivolous pleading,[113] though it has been held that if plaintiff omits to move for judgment on the ground that the answer is frivolous, or to have it made more definite and certain, he waives the defect and cannot move at the trial for judgment on the pleadings.[114] A late case holds that the court may, even on the trial, give judgment on an insufficient answer as frivolous though no motion is made therefor, in the exercise of its inherent power.[115]

106 Vlasto v. Varelopoulos, 73 App. Div. 145.

107 Vlasto v. Varelopoulos, 73 App. Div. 145.

108 Code Civ. Proc. § 537; Beal v. Union Paper Box Co., 4 Civ. Proc. R. (Browne) 18; Singleton v. Thornton, 9 State Rep. 600, 26 Wkly. Dig. 434.

109 Feder v. Samson, 22 Misc. 111.

110 Lee v. Jacob, 38 App. Div. 531; Ross v. Ross, 25 Hun, 642.

111 Currie v. Baldwin, 6 Super. Ct. (4 Sandf.) 690; Burrall v. Moore, 12 Super. Ct. (5 Duer) 654.

112 Oppermann v. Barr, N. Y. Daily Reg., April 28, 1884.

113 Stokes v. Hagar, 1 Code R. 84.

114 Green v. Raymond, 14 Wkly. Dig. 322.

115 Zinsser v. Columbia Cab Co., 66 App. Div. 514.

Frivolous Pleadings.

A motion for judgment on one defense in an answer as frivolous, and to strike out another as sham, may be joined in one application,[116] but in such case whether judgment on the whole answer can be granted, must depend on whether the parts of the pleading objected to are stricken out, and if they are, whether the whole answer as it then remains be frivolous.[117] A prayer in the notice of motion for judgment for frivolousness for "other or further relief" warrants the granting of an order striking out the answer[118] or a defense therein.[119]

On the motion, affidavits cannot be used, but the motion must be determined solely by an inspection of the pleadings.[120] For the purpose of the motion, the pleading is deemed to be true.[121] In opposing the motion, defendant has the right to attack the sufficiency of the complaint on the ground that it does not state a cause of action.[122] The motion should not be denied because the pleading mingles evidence with facts and conclusions and is so lengthy that it is difficult to determine what it does contain.[123]

If the motion is granted, the order should be that the pleading be overruled as frivolous and that the moving party have judgment for the relief demanded in his complaint or counter-

[116] People v. McCumber, 18 N. Y. 315; Adams v. McPartlin, 11 Abb. N. C. 369. It is the better practice to state in the motion what answers are deemed frivolous and what sham. Bailey v. Lane, 13 Abb. Pr. 354.

[117] Lockwood v. Salhenger, 18 Abb. Pr. 136.

[118] Thompson v. Erie R. Co., 45 N. Y. 468.

[119] Hecker v. Mitchell, 5 Abb. Pr. 453, 13 Super. Ct. (6 Duer) 687.

[120] Platt & Washburn Refining Co. v. Hepworth, 13 Civ. Proc. R. (Browne) 122; Dancel v. Goodyear Shoe Machinery Co., 67 App. Div. 498. But if defendant defaults, plaintiff must prove receipt of pleading and service of notice of motion. Darrow v. Miller, 5 How. Pr. 247. And if an order to show cause or an extension of time to reply is sought, an affidavit should be presented. So if the motion is joined with a motion to strike out as sham.

[121] Livingston v. Hammer, 20 Super. Ct. (7 Bosw.) 670.

[122] Van Alstyne v. Freday, 41 N. Y. 174; Munger v. Shannon, 61 N. Y. 251; McMoran v. Lange, 25 App. Div. 11.

[123] Halliday v. Barber, 38 Misc. 116.

claim;[124] and leave may be granted to amend on terms where it appears that the answer was served in good faith[125] and an affidavit of merits is presented.[126] The order should not strike out the frivolous pleading as it should remain on the record and become a part of the judgment roll.[127] Costs, as upon a motion, may be awarded.[128]

If the application is denied, an appeal cannot be taken from the determination, and the denial of the application does not prejudice any of the subsequent proceedings of either party.[129] But if the motion is granted erroneously, the adverse party may appeal, because, by the erroneous striking out of his pleading, he would lose a substantial right.[130]

§ 924. Sham answer or defense.

The Code provides that a sham answer or a sham defense may be stricken out by the court, upon motion, and upon such terms as the court deems just.[131] Prior to the Code, the power to strike out false pleas was regulated by rules of court.[132] The old Code, as originally enacted, provided for the striking out of "sham and irrelevant" answers and de-

[124] Elwood v. Roof, 82 N. Y. 428.

The proper order to be entered upon the granting of a motion for judgment on a frivolous demurrer is for judgment on the demurrer with costs of suit, and with costs of the motion. Tuthill v. Broakman, 3 Wkly. Dig. 546.

The order may, however, merely adjudge the pleading frivolous, and leave plaintiff to apply to the court for relief. Guilhon v. Lindo, 22 Super. Ct. (9 Bosw.) 605.

[125] Fales v. Hicks, 12 How. Pr. 153; Stedeker v. Bernard, 4 Month. Law Bul. 31, N. Y. Daily Reg., Sept. 16, 1882.

[126] Stedeker v. Bernard, 4 Month. Law Bul. 31, N. Y. Daily Reg., Sept. 16, 1882; Bank of Lowville v. Edwards, 11 How. Pr. 216.

[127] Briggs v. Bergen, 23 N. Y. 162; Siriani v. Deutsch, 12 Misc. 213, 67 State Rep. 892; People v. McCumber, 18 N. Y. 315; Farmers' & Mechanics' Nat. Bank v. Rogers, 19 State Rep. 464. See dissenting opinion of Putnam, J., in Barton v. Griffin, 36 App. Div. 572, 579.

[128] Code Civ. Proc. § 537.

[129] Code Civ. Proc. § 537.

[130] Crucible Co. v. Steel Works, 9 Abb. Pr., N. S., 195, 57 Barb. 447.

[131] Code Civ. Proc. § 538, which is merely declaratory of the common law.

[132] People v. McCumber, 18 N. Y. 315.

fenses,[133] but the word "irrelevant" was stricken out of the statute on the ground that it was the equivalent of "frivolous."

—— **Definition.** The Code does not define the terms "sham answer" and "sham defense" but the court of appeals held at an early day that "sham answer" and "false answer" are synonymous terms.[134] A defense is sham where it is so clearly false in fact that it does not in reality involve any matter of substantial litigation.[135] It is immaterial whether the pleader knew of the falsity or whether he acted in good faith,[136] though the question of good or bad faith may influence the court in granting or refusing relief.[137] A pleading is sham though false only in part where the true matter is not, of itself, sufficient to constitute a defense.[138] But an answer is not sham merely because it contains inconsistent averments.[139]

—— **What pleadings may be stricken out as sham.** Sham pleadings are limited to answers and defenses therein. Demurrers,[140] counterclaims,[141] general denials,[142] or specific denials,[143] cannot be stricken out as sham.[144]

—— **Sham denials.** Prior to the Codes it was held that the general issue would not be summarily disposed of as sham, but that special pleas might be, even though technically well pleaded in form and substance. Such was the rule as to

133 Code Pro., § 152.

134 People v. McCumber, 18 N. Y. 315. See, also, Board Com'rs of Excise of Chenango County v. McCullough, 39 How. Pr. 37.

135 People v. McCumber, 18 N. Y. 320.

136 Roome v. Nicholson, 8 Abb. Pr., N. S., 343.

137 2 Waite's Pr. 488.

138 Winslow v. Ferguson, 1 Lans. 436.

139 Smith v. Wells, 20 How. Pr. 158; Bryant v. Bryant, 25 Super. Ct. (2 Rob.) 612.

140 Kain v. Dickel, 46 How. Pr. 208.

141 Collins v. Suau, 30 Super. Ct. (7 Rob.) 94; Fettretch v. McKay, 47 N. Y. 426; Baum's Castorine Co. v. Thomas, 92 Hun, 1, 73 State Rep. 41; First Nat. Bank of Saratoga Springs v. Slattery, 4 App. Div. 421, 74 State Rep. 791, 38 N. Y. Supp. 859.

These decisions are put on the ground that a counterclaim is not a "defense" but it would seem that if the answer consists of nothing but a counterclaim the Code authorizes the striking out thereof.

142 See post, p. 1077.

143 See post, p. 1077.

144 Wood v. Sutton, 12 Wend. 234.

the general issue even though the plaintiff was able to establish by affidavits, beyond question, that the plea was false in fact. This rule was not only followed under the Code as to general denials[145] but was also extended to specific denials;[146] and it applies whether the denial is on information and belief[147] or is a denial of knowledge or information sufficient to form a belief.[148] So an answer which consists in part of a denial of the complaint cannot be stricken out as sham.[149] And it would seem that an answer consisting of a denial should not be stricken out as sham, even after defendant, on examination before trial, has admitted what the answer denies.[150]

—— **Sham defenses.** An affirmative defense may be stricken out if it clearly appears that it is false,[151] but it seems that a verified answer setting up an affirmative defense cannot be

[145] Wayland v. Tysen, 45 N. Y. 281; First Nat. Bank of Saratoga Springs v. Slattery, 4 App. Div. 421; Robertson v. Rockland Cemetery Imp. Co., 54 App. Div. 191; Blum v. Bruggemann, 58 App. Div. 377; Albany County Bank v. Rider, 74 Hun, 349; Fellows v. Muller, 38 Super. Ct. (6 J. & S.) 137, 48 How. Pr. 82; Martin v. Erie Preserving Co., 48 Hun, 81, 15 State Rep. 614, 14 Civ. Proc. R. (Browne) 224; Wilson v. Eastman & Mandeville Co., 56 Hun, 194, 18 Civ. Proc. R. (Browne) 267, 30 State Rep. 409, 9 N. Y. Supp. 189.

[146] Thompson v. Erie R. Co., 45 N. Y. 468; Meurer v. Brinkman, 25 Misc. 12; Central Bank of Rochester v. Thein, 76 Hun, 571.

[147] Howe v. Elwell, 57 App. Div. 357; Pardi v. Conde, 27 Misc. 496 is not the law.

[148] Nichols v. Corcoran, 38 Misc. 671; Alexander v. Aronson, 65 App. Div. 174; Ginnel v. Stayner, 71 App. Div. 540; Wayland v. Tysen, 45 N. Y. 281; Sherman v. Boehm, 15 Abb. N. C. 254; Neuberger v. Webb, 24 Hun, 347; Cavanagh v. Oceanic Steam Nav. Co., 33 State Rep. 903, 19 Civ. Proc. R. (Browne) 315; Robert Gere Bank v. Inman, 51 Hun, 97, 24 State Rep. 160; (reviewing the authorities); Gallagher v. Merrill, 13 App. Div. 182, 77 State Rep. 303; Wilson v. Eastman & Mandeville Co., 56 Hun, 194.

[149] Gross v. Bock, 11 State Rep. 295; Colt v. Davis, 50 Hun, 366, 20 State Rep. 309, 16 Civ. Proc. R. (Browne) 180.

[150] Schultze v. Rodewald, 1 Abb. N. C. 365.

For dicta to the contrary, however, see Reynolds v. Craus, 42 State Rep. 624.

[151] Fellows v. Muller, 38 Super. Ct. (6 J. & S.) 137, 48 How. Pr. 82; First Nat. Bank of Saratoga Springs v. Slattery, 4 App. Div. 421, 74 State Rep. 791, 38 N. Y. Supp. 859.

stricken out as sham.[152] And a part of a defense cannot be stricken out as sham.[153] That a defense is demurrable, does not preclude a motion to strike it out as sham.[154] But a defense is not sham merely because it is demurrable for insufficiency.[155] An answer setting up the pendency of another action may be stricken out as false,[156] though true at the time the answer was served.[157]

——Motion and order. It has been held that the motion may be made at any time before trial,[158] but it would seem that it should be made before other inconsistent steps are taken, such as a motion to make more definite and certain;[159] and the motion has been denied before trial because of laches.[160] So plaintiff may be precluded from moving by failure to object to copy of proposed amended answer served on him, which the court permitted to be served.[161] And if defendant makes affidavit that the answer is interposed in good faith and not for delay, with an affidavit of merits, the answer

[152] Smith v. Homer, 15 Misc. 403, 72 State Rep. 37; Wayland v. Tysen, 45 N. Y. 281; Central Bank of Rochester v. Thein, 76 Hun, 571; Thompson v. Erie R. Co., 45 N. Y. 468; Rogers v. Vosburgh, 87 N. Y. 228; Barney v. King, 37 State Rep. 533, 13 N. Y. Supp. 685.

[153] Starr v. Griswold, 1 Wkly. Dig. 11; Barney v. King, 37 State Rep. 533; Tripp v. Daball, 11 Civ. Proc. R. (Browne) 112.

[154] Van Benschoten v. Yaple, 13 How. Pr. 97; Lee Bank v. Kitching, 20 Super. Ct. (7 Bosw.) 664, 11 Abb. Pr. 435.

[155] Carpenter v. Bell, 24 Super. Ct. (1 Rob.) 711, 19 Abb. Pr. 258; Hubbard v. Gorham, 38 Hun, 162; Ingersoll v. Dixon, 49 State Rep. 372; Kelly v. Ernest, 26 App. Div. 90; White v. Kidd, 4 How. Pr. 68, 2 Code R. 47.

[156] Hallett v. Hallett, 10 Misc. 304, 63 State Rep. 175, 24 Civ. Proc. R. (Scott) 102; Harris v. Hammond, 18 How. Pr. 123.

[157] Clark v. Clark, 30 Super. Ct. (7 Rob.) 276.

[158] Miln v. Vose, 6 Super. Ct. (4 Sandf.) 660.

There is some conflict as to whether the motion may be made after service of a notice of trial. That the motion may be so made is held in Brassington v. Rohrs, 3 Misc. 258, and in Beebe v. Marvin, 17 Abb. Pr. 194, but the contrary is held in Meeks v. Vogel, N. Y. Daily Reg., March 30, 1881.

[159] Kellogg v. Baker, 15 Abb. Pr. 286.

[160] Belsena Coal Min. Co. v. Liberty Dredging Co., 26 Misc. 846.

[161] Mussina v. Stillman, 13 Abb. Pr. 93; Munn v. Barnum, 1 Abb. Pr. 281, 12 How. Pr. 563; Farmers' & Mechanics' Bank v. Smith, 15 How. Pr. 329; People v. McCumber, 18 N. Y. 315.

should not ordinarily be stricken out.[162] An answer will not be adjudged to be sham simply on affidavit that it is false, for this would be trying the merits of the defense on affidavits. But the court must be satisfied from inspecting the pleading, or from circumstances brought to its knowledge, that the object of the pleader was to delay or annoy the plaintiff, or trifle with the court.[163] The court should not grant the motion unless (1) defendant admits falsity of pleading expressly or by implication;[164] or, (2) by not denying, admits sufficient facts alleged against it to establish its falsity;[165] or (3) the answer is on information and belief, and the motion is supported by the positive affidavit of plaintiff that it is false, the reasons stated for the belief being insufficient to sustain a finding of fact that it is true.[166] The court cannot, as on a demurrer, look to the sufficiency of the preceding pleading.[167] But the denial of a motion to strike out an answer as frivolous does not prevent a motion to strike it out as sham.[168]

The motion should be made on notice or on an order to

[162] Henderson v. Manning, 5 Civ. Proc. R. (Browne) 221; Tripp v. Daball, 11 Civ. Proc. R. (Browne) 112; Gardenier v. Eldred, 4 Misc. 505.

[163] Albany County Bank v. Rider, 74 Hun, 349, 56 State Rep. 391; Hadden v. New York Silk Mfg. Co., 1 Daly, 388; Walter v. Fowler, 85 N. Y. 621; Eaton v. Burnett, 48 Super. Ct. (16 J. & S.) 548.

[164] McCarty v. O'Donnell, 30 Super. Ct. (7 Rob.) 431.

[165] McCarty v. O'Donnell, supra.

[166] McCarty v. O'Donnell, supra; Kay v. Whittaker, 44 N. Y. 565.

Especially is this so where defendant files no counter affidavits. Corbett v. Eno, 13 Abb. Pr. 65.

But failure to fully deny by counter affidavit, does not necessarily require striking out. Wirgman v. Hicks, 6 Abb. Pr. 17.

And the rule permitting the plaintiff in certain cases to show by affidavits that the answer is false, where upon information and belief, and the facts alleged as constituting the plaintiff's cause of action are necessarily within the defendant's personal knowledge, does not apply where a corporation is the defendant and the verification is made by one of its officers. Martin v. Erie Preserving Co., 48 Hun, 81, 15 State Rep. 614, 14 Civ. Proc. R. (Browne) 224.

[167] Thomas v. Loaners' Bank, 38 Super. Ct. (6 J. & S.) 466.

[168] Kreitz v. Frost, 5 Abb. Pr., N. S., 277.

show cause,[169] and be supported by affidavits of the moving party and others clearly showing wherein the answer is false.[170] Defendant, in support of his answer or defense, may introduce counter affidavits.[171]

The motion often seeks not only to strike out the answer or a defense as sham, but also to strike out irrelevant or redundant allegations or for judgment on account of frivolousness or to make the answer more definite and certain. These forms of relief are sometimes sought in the alternative.[172] It is also common to join a prayer for general relief. The notice of motion, where falsity is the only ground, merely states that a motion will be made to strike out the answer or a certain defense therein, as sham. An objection that a motion is noticed to strike out several defenses as frivolous and also as sham, without specifying which defense is moved as sham and which as frivolous, is untenable. But it is the better practice to state in the notice on what ground the party applies.[173]

The motion should be granted only where the answer or defense is so plainly sham that there can be no controversy or

[169] In the New York city court, notice of a motion to strike out a pleading must be not less than two days. Code Civ. Proc. § 3161.

[170] Martens v. Burton Co., 7 Misc. 244, 58 State Rep. 31.

The affidavit of verification of the complaint is not a sufficient affidavit. White v. Bennett, 7 How. Pr. 59.

[171] Corbett v. Eno, 13 Abb. Pr. 65, 22 How. Pr. 8; Wirgman v. Hicks, 6 Abb. Pr. 17; Bailey v. Lane, 13 Abb. Pr. 354; Manufacturers' Bank of Rochester v. Hitchcock, 14 How. Pr. 406.

On a motion to strike out an answer as sham, if the motion papers establish a strong prima facie case of falsity and fraud, defendant should be required to show the particular facts on which he relies in support of his answer, so far as to satisfy the court that his answer is not mere pretense. This is not a trial of the action by affidavits; it is only looking into the case far enough to see whether there is a foundation for the answer. Manufacturers' Bank of Rochester v. Hitchcock, 14 How. Pr. 406.

[172] People v. McCumber, 18 N. Y. 315; Lockwood v. Salhenger, 18 Abb. Pr. 136.

The fact that a plaintiff moves for judgment, instead of moving to strike out a false answer, is no objection to granting the former relief, as the right to judgment follows the striking out of a false answer. Kreitz v. Frost, 5 Abb. Pr., N. S., 277.

[173] Bailey v. Lane, 13 Abb. Pr. 354, 21 How. Pr. 475.

argument on the subject,[174] and slight circumstances indicating good faith will prevent the answer from being stricken out as sham.[175] The proof of the falsity must be clear and decisive.[176] It is not enough that the court should perceive but little prospect of a result favorable to defendant, or even that plaintiff's ultimate success appears sure.[177] When the defendant supports his defense by an affidavit stating specially the grounds of it, he cannot generally be deprived of the benefit of a trial in the ordinary mode.[178]

After an order has been entered striking out an answer as sham, plaintiff may proceed to obtain judgment by default as if no answer had been interposed.[179] The order may allow an amended answer to be served, on terms,[180] but if such right is not granted by the court it seems that an amended answer of course cannot be served.[181]

§ 925. Failure of complaint to state cause of action.

While the failure of the complaint to state a cause of action, may be set up by answer and is a ground of demurrer, yet the objection is not waived by failure to so urge it and it may be raised by a motion made at the trial to dismiss the complaint.[182] The dismissal may be moved for at the trial as a matter of right, not of discretion.[183] The practice, however, is not to be commended.[184] And it has been held that

[174] Schoonmaker v. City of New York, 7 State Rep. 430, 27 Wkly. Dig. 19.

[175] Munn v. Barnum, 1 Abb. Pr. 281, 12 How. Pr. 563.

[176] Morey v. Safe Deposit Co., 7 Abb. Pr., N. S., 199.

[177] Kiefer v. Thomass, 6 Abb. Pr., N. S., 42.

[178] American Encaustic Tiling Co. v. Reich, 34 State Rep. 64; McLaughlin v. Engelhardt, 62 N. Y. Supp. 428.

[179] The order should not give "judgment as demanded in the complaint." De Forest v. Baker, 24 Super. Ct. (1 Rob.) 700, 1 Abb. Pr., N. S., 34; Potter v. Carreras, 27 Super. Ct. (4 Rob.) 629.

[180] Burrall v. Bowen, 21 How. Pr. 378.

[181] Schmid v. Arguimban, 46 How. Pr. 105.

[182] Tooker v. Arnoux, 76 N. Y. 397; Dearing v. McKinnon Dash & Hardware Co., 33 App. Div. 31, 41; Stone v. Groton Bridge & Mfg. Co., 77 Hun, 99.

[183] Tooker v. Arnoux, 76 N. Y. 397.

[184] Thomas v. Smith, 75 Hun, 573.

where a complaint does not state a cause of action against one of several defendants nor demand judgment against him, his relief is by demurrer and not by motion to strike out the complaint.[185] So the question whether a cause of action is equitable in its nature cannot be first raised at the trial by motion to dismiss the complaint.[186]

Though the complaint may be dismissed for failure to state a cause of action, it cannot be dismissed because the legal effect of facts was not stated or the proper relief demanded,[187] or because indefinite and uncertain,[188] or because of imperfect or informal averments or an argumentative statement,[189] or because of misjoinder of causes of action.[190]

The motion may be made on the opening of the trial,[191] or, in the discretion of the court, when plaintiff rests;[192] but, if denied, it must be renewed at the end of the trial.[193] Likewise, the motion may be made before a referee.[194] The mo-

[185] People v. New York City U. G. Ry. Co., 39 State Rep. 425. But see Montgomery County Bank v. Albany City Bank, 7 N. Y. (3 Seld.) 459 which is to the contrary.

[186] Stiefel v. New York Novelty Co., 14 App. Div. 371, and cases cited.

[187] Lake v. Sweet, 45 State Rep. 367, 18 N. Y. Supp. 342.

[188] Rowell v. Janvrin, 151 N. Y. 60.

[189] Lake v. Sweet, 45 State Rep. 367, 18 N. Y. Supp. 342.

[190] Tuomey v. O'Reilly, 3 Misc. 302.

But the city court of New York has held that a motion to dismiss because of misjoinder of causes of action may be made at the trial, where the misjoinder then appears for the first time. Southmayd v. Jackson, 15 Misc. 476.

[191] Tillotson v. Nye, 88 Hun, 101; Sheridan v. Jackson, 72 N. Y. 170. A motion made at such time presents merely a question of pleading. Herbert v. Duryea, 87 Hun, 288.

But this practice of dismissing on the opening argument of counsel is not commendable, as a rule. Garrison v. McCullough, 28 App. Div. 467.

[192] Weeks v. O'Brien, 141 N. Y. 199.

[193] Frankel v. Wolf, 7 Misc. 190; Hand v. Shaw, 20 Misc. 698.

See, also, Dearing v. McKinnon Dash & Hardware Co., 33 App. Div. 31, 41.

[194] Coffin v. Reynolds, 37 N. Y. 640.

tion should be specific. A motion to dismiss "on the usual grounds" is too vague and indefinite.[195]

The motion, if made before any evidence is taken, is to be decided as if a demurrer had been interposed on the same ground, and granted only when it appears that, admitting all the facts alleged, including those to be inferred by fair intendment, it presents no cause of action whatever.[196] If the complaint itself shows a defense, the motion may be granted.[197] But the fact that the complaint is drawn in disregard of the rules of pleading, if its allegations are susceptible of a construction that may support the action, does not authorize its dismissal before evidence is taken.[198] And if a motion to dismiss is made at the trial on the ground that the complaint fails to state a cause of action, the court may reserve its decision until after the trial, and then if the substantial rights of the defendant will not be injuriously affected thereby, permit an amendment.[199] So if the defect in the complaint is supplied by allegations in the answer, the motion will not be granted.[200] And if the defect is supplied by evidence introduced at the trial, and the motion to dismiss is not made until thereafter, a dismissal will not be ordered;[201] and error in denying a motion to dismiss is cured by subsequent proof of the omitted fact.[202] If the complaint is dismissed before the introduction of testimony, no decision need be made by the court or referee.[203]

[195] Hartley v. Mullane, 20 Misc. 418.

[196] Ketchum v. Van Dusen, 11 App. Div. 332; Spies v. Michelsen, 2 App. Div. 226; Albany Belting & Supply Co. v. Grell, 67 App. Div. 81; Wilson v. Press Pub. Co., 14 Misc. 514, 70 State Rep. 770.

[197] Bridge v. Payson, 7 Super. Ct. (5 Sandf.) 210.

[198] United States Nat. Bank v. Homestead Bank, 46 State Rep. 173.

[199] National Bank of Deposit v. Rogers, 166 N. Y. 380.

[200] Cragin v. O'Connell, 50 App. Div. 339; Miller v. White, 4 Hun, 62; Johnson v. Thorn, 27 Misc. 771.

[201] Weeks v. O'Brien, 141 N. Y. 199; Kruger v. Galewski, 13 Misc. 56; Miller v. White, 8 Abb. Pr., N. S., 46, 57 Barb. 504.

This rule applies where the proof shows a right to a part of the relief sought. Plummer v. Gloversville Electric Co., 20 App. Div. 527.

[202] Lounsbury v. Purdy, 18 N. Y. 515.

[203] Wood v. Lary, 124 N. Y. 83. Order not appealable. Knowback v. Steel Co., 84 N. Y. Supp. 297.

§ 926. Judgment on the pleadings at the trial.

If the answer admits by failure to deny[204] or sets up new matter which is no defense,[205] plaintiff may move at the opening of the trial for judgment on the pleadings.[206] Such a motion is in effect a demurrer and in testing the sufficiency of the answer, all the facts alleged therein must be taken as proved.[207] This motion may be made before a referee.[208]

Furthermore, if the reply admits affirmative matter set up in the answer which is a complete bar to the action, a motion by defendant for judgment on the pleadings should be granted, unless an amendment is allowed.[209]

And a defendant may move, on notice to all parties, that judgment be entered for the relief demanded in the complaint, where there is no answer raising an issue for trial; and the fact that there are defendants whose time to answer has not expired, and who have not answered, will not avail plaintiff as a ground of objecting to the immediate granting of the motion, if such defendants after notice do not oppose the motion. Nor does it avail plaintiff as an objection that many persons interested are not personally named as defendants on the record, but are represented by the joining of one or more of their class.[210]

§ 927. Election between causes of action.

A misjoinder of causes of action in a complaint, such as to cause the complaint to be demurrable, cannot ordinarily be first urged at the trial by a motion to compel plaintiff to

[204] Place v. Bleyl, 45 App. Div. 17. See, also, Sturz v. Fisher, 38 App. Div. 457; Hughes v. Wilcox, 17 Misc. 32; Hoffman v. New York, L. E. & W. R. Co., 50 Super. Ct. (18 J. & S.) 403.

[205] Eaton v. Wells, 82 N. Y. 576; Mallory v. Lamphear, 8 How. Pr. 491; Grocers' Bank v. Murphy, 9 Daly, 510.

[206] And in People v. Northern R. Co., 42 N. Y. 217, judgment on the pleadings was granted at special term, before trial, on the ground that the allegations of the complaint were admitted by the answer and no issue was raised for trial.

[207] Quinlan v. Fairchild, 76 Hun, 312, 59 State Rep. 84.

[208] Schuyler v. Smith, 51 N. Y. 309.

[209] Cauchois v. Proctor, 1 App. Div. 16.

[210] Havemeyer v. Brooklyn Sugar Refining Co., 26 Abb. N. C. 157.

elect.[211] But if the proof necessary to sustain the two or more causes of action would be inconsistent and incongruous, defendant may move to compel plaintiff to elect on which he will proceed by striking out all the other causes of action.[212] The object of requiring plaintiffs to elect between inconsistent causes of action is to simplify the issues of fact so that they may be intelligibly and fairly tried.[213] And where plaintiff embodies in his complaint two causes of action based upon the same transaction, which may tend to confuse the jury, he may be required to elect before the trial upon which he shall rely.[214] But, as already stated,[215] concurrent causes of action for the same recovery may be pleaded and hence in such a case an election will not ordinarily be compelled.[216] Thus plaintiff will not be compelled to elect between a claim for the agreed price and a claim on a quantum meruit. So one cause of action based on the original claim or indebtedness, where joined with another based on an obligation in which the original has been merged, as where suit is brought on a judgment and on the original debt, will not require an election.[217] And in an equitable action, plaintiff can not be compelled to elect whether he will try the cause as for a continuing trespass or a nuisance.[218] So where the facts stated in a complaint may constitute either a cause of action for conversion or a cause of action upon contract, but are alleged as a single cause of action only, and no motion to have such two causes of action separately stated is made before the trial, the court should not, upon the trial, compel the plaintiff to elect between them.[219]

[211] Blossom v. Barrett, 37 N. Y. 434; Sherman v. Inman Steam Ship Co., 26 Hun, 107; Gillett v. Borden, 6 Lans. 219.

[212] Budd v. Bingham, 18 Barb. 496; Cowenhoven v. City of Brooklyn, 38 Barb. 9; Stokes v. Behrenes, 23 Misc. 442.

[213] Tuhill v. Skidmore, 124 N. Y. 148.

[214] Waller v. Lyon, 17 Wkly. Dig. 305.

[215] See ante, p. 837.

[216] Velie v. Newark City Ins. Co., 65 How. Pr. 1, 12 Abb. N. C. 309.

Contra,—Gardner v. Locke, 2 Civ. Proc. R. (Browne) 252; Dorr v. Mills, 3 Civ. Proc. R. (Browne) 7.

[217] Krower v. Reynolds, 99 N. Y. 245.

[218] Follett v. Brooklyn El. R. Co., 91 Hun, 296, 70 State Rep. 856; Ottinger v. New York El. R. Co., 43 State Rep. 817.

[219] Whitbeck v. Kehr, 10 Daly, 403.

And the court will not compel a party to elect between several causes of action properly pleaded, although it appear probable that, on the trial, but one cause of action will be presented by the pleader.[220] So in action to recover a penalty brought by the state it is not necessary to elect under which section of the statute a recovery is sought.[221]

When the inconsistency plainly appears on the face of the complaint, the defendants should move before answering.[222] If in such a case, the defendant lies by until the trial and then moves, the court may in its discretion wait until part or all of the evidence is taken before deciding the motion,[223] and its denial is so far discretionary[224] that it will not be reviewed when it appears that the defendant was not harmed.[225] And if the motion is denied when made before the evidence is taken, it should be renewed at the close of the trial.[226] A plaintiff cannot be compelled to elect on a motion to make more definite and certain.[227]

§ 928. Election between answer and demurrer.

If a defendant serves a pleading which assumes to both answer and demur, he should be compelled to elect.[228] But if,

220 Smith v. Douglass, 15 Abb. Pr. 266.

221 People v. Girard, 73 Hun, 457.

222 Tuthill v. Skidmore, 124 N. Y. 148; Cassidy v. Daly, 11 Wkly. Dig. 222; American Dock & Imp. Co. v. Staley, 40 Super. Ct. (8 J. & S.) 539.

223 Einson v. North River Electric Light & Power Co., 34 Misc. 191; Southworth v. Bennett, 58 N. Y. 659.

224 Kerr v. Hays, 35 N. Y. 331, 336; People v. Tweed, 63 N. Y. 194; Nadelman v. Pitchel, 36 Misc. 768; Hartman v. Manhattan Ry. Co., 82 Hun, 531, 64 State Rep. 96, 31 N. Y. Supp. 498.

The discretion is not reviewable in the court of appeals. People v. Briggs, 114 N. Y. 56.

225 Tuthill v. Skidmore, 124 N. Y. 148.

226 Cram v. Springer Lithographing Co., 10 Misc. 660, 64 State Rep. 304, 31 N. Y. Supp. 679.

227 Seymour v. Warren, 71 App. Div. 421.

228 Struver v. Ocean Ins. Co., 16 How. Pr. 422; Higgins v. Hoppock, 22 Civ. Proc. R. (Browne) 313; Spellman v. Weider, 5 How. Pr. 5.

But in an answer otherwise sufficient, a statement that the complaint does not state facts sufficient to constitute a cause of action,

instead of both demurring to and answering the same pleading, defendant demurs to a part and answers a part of a single cause of action, the remedy is to move to strike out the demurrer.[229]

§ 929. Election between defenses.

Motion to compel the defendant to elect on which of several grounds he will rest his defense is addressed to the discretion of the court, and its decision cannot be reviewed.[230] And it would seem that inasmuch as inconsistent defenses may be pleaded, this motion should be granted only in extreme cases.[231] But if the same facts are set up both as a counterclaim and as a defense, it would seem that a motion will lie to compel an election.[232]

§ 930. Separation of causes of action.

The objection that two causes of action united in a complaint are not separately stated, can only be taken by motion,[233] before trial.[234] The motion must be made promptly.[235] It is often joined with a motion to make the complaint more definite and certain; and under the prayer for further and other relief irrelevant and redundant matter may be stricken out.[236] On the

though unnecessary, does not amount to a demurrer; and defendant should not be required on motion to elect whether he would abide by his pleading as an answer or a demurrer. Bernard v. Morrison, 2 Civ. Proc. R. (McCarty) 425; Camp v. Bedell, 52 Hun, 63.

229 McKesson v. Russian Co., 27 Misc. 96.

230 Kerr v. Hays, 35 N. Y. 331.

231 La Societa Italiana Di Beneficenza v. Sulzer, 47 State Rep. 292; judgment affirmed in 138 N. Y. 468 without deciding this point.

232 And if defendant pleads a fact, both as a bar and as a counterclaim, and no motion is made to compel an election, if it cannot avail as both, he is entitled to elect at the trial, even after he finds the fact unavailable in one aspect. Alger v. Vanderpoel, 34 Super. Ct. (2 J. & S.) 161.

233 Freer v. Denton, 61 N. Y. 492.

234 Commercial Bank of Keokuk v. Pfeiffer, 22 Hun, 327; Colton v. Jones, 30 Super. Ct. (7 Rob.) 164.

235 Wood v. Anthony, 9 How. Pr. 78.

236 Trenndlich v. Hall, 7 Civ. Proc. R. (Browne) 62.

hearing of the motion, it is not necessary or proper to determine whether the action can be maintained and the relief sought can be granted.[237] The motion can be granted only when there are two causes of action well pleaded.[238] If facts which may constitute two causes of action are contained in separate paragraphs, and it is not apparent whether it is intended to set forth two causes of action or only one, the motion should be granted.[239] But if it is fairly doubtful whether the complaint states more than one cause of action, and plaintiff intends to state but a single one, the motion should not be granted, but defendants should be left to their remedy by demurrer.[240] If plaintiff resist the motion on the ground that but a single cause of action is stated, the motion may be denied on condition that plaintiff amend so as to omit all matters not relevant to a single cause of action.[241]

An order requiring plaintiff to separately state and number his causes of action usually grants leave to defendant to answer or demur to the amended complaint within twenty days from its service and provides that if an amended complaint is not served, the original shall be stricken out.

§ 931. Separation of facts in counterclaim.

A motion to compel defendant to separately state and number facts relating to a counterclaim will be denied where a demurrer would sufficiently present the questions involved.[242]

§ 932. Separation of new matter in answer from denials.

Defendant will be required, on motion, to separate new matter from denials in his answer.[243]

237 Pope v. Kelly, 30 App. Div. 253.

238 Trenndlich v. Hall, 7 Civ. Proc. R. (Browne) 62.

239 Oakley v. Tuthill, 7 Civ. Proc. R. (Browne) 339.

240 Pope v. Kelly, 30 App. Div. 253.

241 Blake v. Barnes, 30 State Rep. 299; Daly v. Wolaneck, 29 Misc. 162.

242 Baer v. Seymour, 12 State Rep. 166.

243 Fay v. Hauerwas, 26 Misc. 421; Carpenter v. Mergert, 39 Misc. 634.

§ 933. Inconsistency in reply.

If new matter set forth in a reply is inconsistent with the allegations in the complaint, the court, in the exercise of its inherent power, may grant a motion to strike out the reply.[244]

[244] William H. Frank Brew. Co. v. Hammersen, 22 App. Div. 475; Eidlitz v. Rothschild, 87 Hun, 243.
But see Thomas v. Loaners' Bank, 38 Super. Ct. (6 J. & S.) 466.

CHAPTER IX.

WAIVER OF OBJECTIONS.

§ 934. Objections to complaint.

A demurrable objection appearing on the face of a complaint, if not taken by demurrer, is waived.[1] The objection cannot be taken by answer. But this rule is subject to an important exception in that the Code provides that if an objection which is enumerated in the Code as a ground for demurrer is not taken, either by demurrer or answer, the defendant is deemed to have waived it, except the objection to the jurisdiction of the court or the objection that the complaint does not state facts sufficient to constitute a cause of action.[2] Hence the objections that the court has not jurisdiction of the person of defendant,[3] or that plaintiff has not legal capacity to sue,[4] or that there is

[1] Patchin v. Peck, 38 N. Y. 39. This proposition is so well settled that it is unnecessary to cite other cases.

[2] Code Civ. Proc. § 499.

[3] Bunker v. Langs, 76 Hun, 543.

[4] Van Zandt v. Grant, 67 App. Div. 70; Spooner v. Delaware, L. & W. R. Co., 115 N. Y. 22; Fulton Fire Ins. Co. v. Baldwin, 37 N. Y. 648; Perkins v. Stimmel, 114 N. Y. 359; Nanz v. Oakley, 122 N. Y. 631; Ward v. Petrie, 157 N. Y. 301. For other cases holding this general rule, see 10 Abb. Cyc. Dig. 546-548.

another action pending,[5] or that there is a defect of parties,[6] or a misjoinder of parties plaintiff,[7] or that causes of action have been improperly joined,[8] must be taken by demurrer or answer or are deemed to be waived.

The want of jurisdiction which is not waived by an omission to demur or answer for that cause, is when the cause of action disclosed by the complaint is not properly cognizable by any court of justice to which the provisions of the Code are applicable.[9] The right to urge a failure of the complaint to state a cause of action may, however, be precluded by evidence produced at the trial, where within the issues.[10]

Following this rule to its logical conclusion, it may be said that no adverse motion which relates to the form of a pleading may be made at or after the trial except where it raises the question as to whether the complaint states a cause of action or whether the court has jurisdiction of the action.

[5] Garvey v. New York Life Ins. & Trust Co., 14 Civ. Proc. R. (Browne) 106; Derby v. Yale, 13 Hun, 273.

[6] Hotopp v. Huber, 160 N. Y. 524; Osterhoudt v. Board Sup'rs of Ulster County, 98 N. Y. 239; Duncan v. China Mut. Ins. Co., 129 N. Y. 237. For other cases in New York holding this general rule, see 10 Abb. Cyc. Dig. 548-551.

But failure to raise the objection of defect of parties by answer or demurrer does not deprive the court of its power to bring in new parties where the controversy can not be completely determined without their presence. Osterhoudt v. Board Sup'rs of Ulster County, 98 N. Y. 239; Thompson v. New York El. R. Co., 16 App. Div. 449; Steinbach v. Prudential Ins. Co., 172 N. Y. 471 which, however, contains a dissenting opinion by Haight, J., on this point.

[7] Fosgate v. Herkimer Mfg. & Hydraulic Co., 12 N. Y. (2 Kern.) 580; Clason v. Baldwin, 129 N. Y. 183; Hier v. Staples, 51 N. Y. 136.

[8] White v. Rodemann, 44 App. Div. 503; Wells v. Betts, 45 App. Div. 115; Williams v. Ingersoll, 23 Hun, 284; Weld v. Reilly, 48 Super. Ct. (16 J. & S.) 531; Marks v. Townsend, 97 N. Y. 590; Jacobson v. Brooklyn El. R. Co., 22 Misc. 281; American Lucol Co. v. Lowe, 41 Div. 500.

[9] De Bussierre v. Holladay, 55 How. Pr. 210.

See, also, Gray v. Ryle, 50 Super. Ct. (18 J. & S.) 198, 5 Civ. Proc. R. (Browne) 387; Wheelock v. Noonan, 108 N. Y. 179; Matter of Walker's Will, 136 N. Y. 20.

[10] Meyer v. Fiegel, 34 How. Pr. 434, 30 Super. Ct. (7 Rob.) 122.

§ 935. Objections to answer.

The insufficiency of an answer in matter of substance may be urged, it seems, either by demurrer or on the trial,[11] but cannot be first urged at the close of the trial.[12] And an answer cannot be dismissed at the trial for insufficiency.[13] So the objection that an answer fails to contain a prayer for relief is waived by going to trial upon an issue of fact.[14]

—— **Counterclaim.** The Code makes no provision as to the effect of failure to demur or reply to a counterclaim, and it has been held that objections to a counterclaim are not waived by failure to so urge.[15]

§ 936. Objection to ruling on demurrer.

By answering over after a demurrer has been sustained, the unsuccessful party precludes himself from thereafter objecting to the ruling,[16] except when the objection relates to jurisdiction of the subject-matter or the failure of the complaint to state a cause of action.[17]

§ 937. Objection to want of reply.

The failure to object waives the right to claim that a counter-

[11] Zinsser v. Columbia Cab Co., 66 App. Div. 514.

[12] Simmons v. Sisson, 26 N. Y. 264; McGuiness v. City of New York, 13 Wkly. Dig. 522, 26 Hun, 142; Griffin v. Todd, 39 State Rep. 19; Currie v. Cowles, 19 Super. Ct. (6 Bosw.) 452; McKnight v. Devlin, 52 N. Y. 399.

[13] Smith v. Countryman, 30 N. Y. 655; Perkins v. Brainard Quarry Co., 11 Misc. 328; Moss v. Wittemann, 4 Misc. 81.

[14] Dawley v. Brown, 9 Hun, 461.

[15] Lipman v. Jackson Architectural Iron Works, 128 N. Y. 58.

Contra,—Ayres v. O'Farrell, 23 Super. Ct. (10 Bosw.) 143; Hammond v. Terry, 3 Lans. 186.

Plaintiff does not waive objections to a counterclaim by admitting without objection evidence also admissible to sustain a defense interposed. Lyungstrandh v. William Haaker Co., 16 Misc. 387, 73 State Rep. 808, 38 N. Y. Supp. 129.

[16] Marie v. Garrison, 13 Abb. N. C. 210; Brown v. Saratoga R. Co., 18 N. Y. 495.

[17] People v. Central R. Co., 42 N. Y. 283; McCullough v. Pence, 85 Hun, 271, 66 State Rep. 470, 38 N. Y. Supp. 986.

claim should have been replied to.[18] So the right to move to compel a reply is waived where not made until after a reference of the action and notice of hearing.[19]

§ 938. Waiver by failure to return pleading.

Formal objections to a pleading, such as the want of a verification, or the failure to number the folios, or to number and separately state the causes of action, are waived by failure to return the pleading within a reasonable time, with the grounds of objection affixed thereto.[20]

§ 939. Waiver by answering pleading.

A party answering in chief a pleading of his adversary, is generally precluded from extrinsic objections to it, except in the discretion of the court.[21] But the objection that counterclaims are not available as such, is not waived by replying to them.[22]

§ 940. Objections cured by verdict.

Defects or omissions in pleading which are cured by the verdict are those necessary circumstances which are implied by law, and which inevitably follow from the substantial fact charged.[23] But the defect in a complaint is not cured by verdict

[18] Clinchy v. Apgar, 16 Misc. 374; Holloway v. Stephens, 2 Thomp. & C. 562, 1 Hun, 308.

[19] Sterling v. Metropolitan Life Ins. Co., 6 State Rep. 96.

[20] White v. Cummings, 5 Super. Ct. (3 Sandf.) 716, Code R., N. S., 107; Chatham Bank v. Van Veghten, 12 Super. Ct. (5 Duer) 628; Corbin v. George, 2 Abb. Pr. 465; Hull v. Ball, 14 How. Pr. 305.

Rule 19 of General Rules of Practice provides that objection that pleading is not properly written, folioed, indorsed or filed is waived by failure to return within twenty-four hours.

[21] Carter v. Newbold, 7 How. Pr. 166.

[22] Smith v. Hall, 67 N. Y. 48; People v. Dennison, 84 N. Y. 272; Mortimer v. Chambers, 63 Hun, 335, 43 State Rep. 365; Dinan v. Coneys, 143 N. Y. 544.

[23] Angell v. Van Schaick, 56 Hun, 247, 30 State Rep. 714; County of Steuben v. Wood, 24 App. Div. 442.

The common law rule was not abolished by the Codes. Brown v. Harmon, 21 Barb. 508.

where the evidence, as introduced, is specifically objected to as incompetent under the complaint.[24]

§ 941. Table showing time to object and remedies.

The following table will show the time to raise enumerated objections to pleadings and the remedies:

PLEADING	OBJECTION	TIME FOR OBJECTION	REMEDIES
Complaint.	Failure to state cause of action.	Before or after trial or on appeal.	Demurrer, motion or objection on appeal.
"	Want of jurisdiction of person of defendant.	Before trial.	Demurrer or answer.
"	Plaintiff's want of legal capacity to sue.	Before trial.	Demurrer or answer.
"	Pendency of another action for same cause.	Before trial.	Demurrer or answer.
"	Defect of parties.	Before trial.	Demurrer or answer.
"	Misjoinder of parties.	Before trial.	Demurrer or answer, if misjoinder of parties plaintiff; answer if misjoinder of parties defendant.
"	Improper joinder of causes of action.	Before trial.	Demurrer or answer.
"	Want of jurisdiction of the subject matter.	Before or at the trial or on appeal.	Demurrer, answer, motion, or objection on appeal.
Complaint, answer, or reply.	Indefiniteness and uncertainty of allegations.	Before demurring or answering	Motion to make more definite and certain.
"	Irrelevant, redundant, or scandalous allegations.	Before demurring or answering.	Motion to strike out allegations.
Complaint.	Joinder of inconsistent causes of action.	Before or at the trial.	Motion to compel election between causes of action.
"	Failure to separate causes of action.	Before trial.	Motion to compel separation or a return of pleading.
"	Defect in verification.	Reasonable time.	Service of unverified answer or return of pleading.

[24] County of Steuben v. Wood, 24 App. Div. 442.

Table Showing Time to Object and Remedies.

PLEADING	OBJECTION	TIME FOR OBJECTION	REMEDIES
Complaint, answer, or reply.	Failure to comply with rules of court as to folioing, serving, filing, etc., of pleading.	24 hours.	Return of pleading with objections indorsed thereon.
Answer.	Insufficiency in matter of substance.	Before or at trial.	Demurrer, answer or motion for judgment on the pleadings.
"	Frivolousness.	Before trial.	Motion for judgment on pleadings.
"	Falsity (Sham).	Before trial.	Motion to strike out answer.
Counter-claim in answer.	Allegations not subject of counter-claim, want of jurisdiction of subject matter, want of legal capacity in defendant to recover, another action pending, failure to state facts sufficient to constitute a cause of action.	Before or at the trial.	Demurrer, reply or motion.
Reply	Insufficiency in law.	Before trial.	Demurrer.
"	Allegations inconsistent with complaint.	Before trial.	Motion to strike out.
"	Frivolousness.	Before trial.	Motion for judgment on pleadings.
Demurrer.	Frivolousness.	Before trial.	Motion for judgment on pleadings.

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